United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,678

HAR-RICH REALTY CORPORATION,

Appellant,

v.

AMERICAN CONSUMER INDUSTRIES, INC., et al.,

Appellees.

835

Appeal from the United States District Court
for the District of Columbia

KURT BERLIN

Southern Building
Washington, D. C. 20005

Attorney for Appellant.

QUESTIONS PRESENTED

1. Can one of two Trustees, after the resignation of his co-trustee, exercise the power of sale in a Deed of Trust?

2. Can noteholder accelerate on the installment note on one day default or when he had led the maker of the note to believe that he will not foreclose for minor late payments or where the default has been cured by tender of the late payment prior to the exercise of acceleration?

3. Are there genuine issues of fact contained in the pleadings herein which make Summary Judgment improper?

4. In view of the admitted attorney/client relationship between noteholder and trustee, and in the absence of knowledge of this relationship by appellant and in the further absence of testimony on the question of the conduct of the trustee, will foreclosure sale be upheld?

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AMERICAN CONSUMER INDUSTRIES, INC., et al.,

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Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order granting summary judgment in favor of the defendants, American Consumer Industries, Inc., and Charles E. Pledger, Jr. and against the plaintiff, Har-Rich Realty Corporation.

Jurisdiction of the Court herein is based upon Title 11, Section 301, *et seq.* of the District of Columbia Code. Plaintiff is a District of Columbia Corporation in good standing.

This Court has jurisdiction to review the judgment under the provisions of Title 28, U.S.C. Section 1291 and Section 1294 respecting appeals from the United States District Courts.

STATEMENT OF FACTS

On or about November 25, 1958 in connection with the purchase of a parcel of land identified as Lot 1 in Square 526 the appellant executed a Deed of Trust (JA 15) and a promissory note (JA 13) wherein the appellant, in part payment for the land, agreed to pay to American Ice Company, which is now the appellee American Consumer Industries, Inc. (hereinafter referred to as "American"), the sum of $35,000.00 with interest at the rate of 5% per annum payable in monthly installments of $350.00 on the 25th day of each month with the usual acceleration clause. Said Deed of Trust appointed appellee Charles E. Pledger, Jr. and the late Randolph C. Richardson as Trustees.

At that time and up to the present said Pledger and Richardson were members of the law firm which represented American (JA 9-10). Said fact was not then known to the appellant (JA 47). On or about May 17, 1962 appellant was advised (JA 37) that one of the trustees, the late Randolph C. Richardson, resigned upon his appointment as judge in the then Municipal Court for the District of Columbia. The Deed of Trust has no provision for the exercise of the power of sale or any other power by the remaining trustee Pledger. Delays in payment of the monthly installments took place in 1961 and 1962 (JA 21,22 , 10), and American accepted payments as much as four months in arrears. On August 5, 1963 American accepted $1,750.00 in check constituting payments for March, April, May, June and July 1963 (JA 33). The August 1963 payment was due August 25, 1963 and the check in payment thereof was

dated August 26, 1963 (JA 31) and mailed to American "either that day or shortly thereafter" (JA 30). On September 12, 1963, American wrote to appellant that they elected to declare the entire sum due and payable (JA 32). On September 20, 1963 American returned the August payment check (JA 40). On November 15, 1963, E. A. Turshen, an attorney, on behalf of his associate who represented appellant at that time, called the offices of Pledger and Edgerton, counsel for American and was instructed to forward the installment payments then due to them (JA 34). On the same day he forwarded the arrearages by Cashier's Check (JA 35). On December 4, 1963 Pledger and Edgerton stated that they would not accept the arrearage (JA 48). On December 18, 1963 the checks were returned (JA 36). On December 20, 1963 the foreclosure auction took place (JA 42).

Suit was then commenced in the Court below by the appellant through the filing of its complaint (JA 1) to set aside the foreclosure sale and for damages. Each of the appellees thereafter filed motions to dismiss and for summary judgment which were opposed by appellant.

On April 23, 1964, the Court below entered an order granting the motions of appellees for summary judgment (JA 61) and dismissing their motions to dismiss without filing any memorandum opinion.

This appeal followed.

STATUTES INVOLVED

The pertinent provisions of the District of Columbia Code, 1961 Edition, as amended, are as follows:

Title 45, Section 603

> The legal estate conveyed to a mortgagee, his heirs and assigns, or to a trustee to secure a debt, his heirs and assigns, shall be construed and held to be a qualified fee simple, determinable upon the release of the mortgage or deed of trust, as hereinafter provided, or the appointment of a new trustee

by judicial decree for the causes hereinafter mentioned: Provided, That nothing in this section contained shall prevent the passing of an absolute and unqualified estate in fee-simple under a deed made by the mortgagee or trustee in pursuance of the powers conferred by the mortgage or deed of trust.

Title 45, Section 604

Whenever a mortgage or deed of trust to secure a debt is executed to two or more mortgagees or trustees in fee simple, upon the death of any one or more of them the legal title and the trust attached to it shall be held to survive to the survivor or survivors and the heirs of the last survivor, subject to the provisions aforesaid.

Title 45, Section 614

In case of the refusal of any trustee named in a deed of trust to secure a debt to accept the trusts thereby created, or of his resignation of said trust after accepting the same, which is hereby allowed, or of his removal from the District of Columbia, or of his inability to act, or for any other good cause shown, it shall be lawful for any party interested in the execution of such trusts to apply to said court by petition, setting forth the appropriate facts and asking for the appointment of a new trustee in his place, and a like proceeding shall be had for the appointment of such trustee as in the case of the death of a trustee, as directed in sections 45-611 and 45-619 of this title: Provided, That any rule to show cause issued in such case shall be served upon the existing trustee, as provided in said sections.

Title 45, Section 816

Every estate granted or devised to two or more persons in their own right, including estates granted or devised to husband and wife, shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate vested in executors or trustees, as such, shall be a joint tenancy, unless otherwise expressed.

SUMMARY OF ARGUMENT

1. That the Trial Court erred in not setting aside the foreclosure sale since the remaining trustee could not exercise the power of sale after his co-trustee had resigned.

2. That the Trial Court erred in holding that there can be an acceleration of an installment Deed of Trust Note on one day's default.

3. That the Trial Court erred in granting the Motion for Summary Judgment in light of the existence of genuine issues of material fact.

4. That the Trial Court erred in not requiring testimony on the question of whether the fiduciary has been faithful to his trust when the pleadings disclose a potential conflict of interest.

ARGUMENT

I.

The Trial Court Erred in Not Setting Aside the Foreclosure Sale Since the Trustee Could Not, as a Matter of Law, Exercise the Power of Sale After His Co-Trustee Had Resigned.

The power of sale is derived from the terms of the Deed of Trust. (See Title 45, Section 603, of the District of Columbia Code, which limits the powers of the Trustees to the powers conferred in the trust instrument.) In this case the Deed of Trust from appellant to Pledger and Richardson, the named Trustees, created a joint tenancy. (Title 45, Section 816, District of Columbia Code.) As a fundamental principle of law a joint tenancy creates the four essential unities of interest, title, time and possession. (Thompson on Real Property, vol. 4, Section 1776 p. 312). Thus it is well established that one of the co-joint tenants acting alone cannot exercise any of the powers vested in the joint tenancy and certainly not the power of sale. (48 C.J.S. 936.) In this case it is undisputed that one of the two trustees, the late Randolph C. Richardson, did resign as Trustee upon his appointment to the Court. This resignation

constituted a severance of the joint tenancy in the absence of language in the Deed of Trust authorizing the remaining Trustee to act by himself or authorizing substitution of Trustees by the noteholder. Therefore, the holder of the note was required to follow the provisions of Title 45, Section 614 [D. C. Code] in substituting for the resigned Trustee. In other words, upon the resignation of Judge Richardson, appellees could, by orderly legal process, have petitioned the Court for the appointment of a substitute trustee; and thereafter the appellees would have been in a position to have a legally proper foreclosure sale. Judge Jones in his questions to appellant's attorney recognized the validity of this argument, but felt that this would only postpone rather than forestall the foreclosure sale. This is precisely the point. The procedure in this jurisdiction vests a great amount of power in Trustees to be exercised without reference to judicial review and Court approval. The Congress has, however, laid down certain statutory requirements and the fact that there are so relatively few of these makes compliance a necessity rather than a legal technicality. We have found no court decision in this jurisdiction (or any jurisdiction, for that matter) indicating that, upon the resignation of one co-trustee full title will vest in the other co-trustee when no clause of that nature is included in the Deed of Trust or provided for by statute.

Furthermore, Title 45, Section 614 [D. C. Code] *supra,* specifically speaks ". . . of his resignation of said trust after accepting the same which is hereby allowed . . . ." thus recognizing the necessity for re-establishing the severed joint tenancy in order to exercise the power of sale.

Further evidence that resignation of one trustee does not pass the powers of the Trustees to the remaining trustee may be seen in Title 45, Section 604 [D. C. Code] *supra.* This is the only section of "Chapter 6 Mortgages and Deeds of Trust" of the D. C. Code dealing with the survival of title in Trustees. It provides for survival of title in the surviving trustee or trustees only in the case of the death of a co-trustee. The D. C. Code is silent with regard to survival of title if one co-trustee resigns.

Therefore, using the recognized principles of statutory intepretation, this means that by affirming the power of survival in the case of death, Congress has negated it under all other circumstances. Thus upon the resignation of Judge Richardson, appellee Pledger did not possess the power of sale formerly vested in both trustees jointly.

The later death of Judge Richardson did not increase the powers of Pledger. For at the time of his death Judge Richardson was no longer a trustee, thereby precluding the operation of Title 45, Section 604, of the D. C. Code, *supra*.

Thus, appellee Pledger could not exercise the power of sale at the foreclosure sale on December 20, 1963. Consequently the attempted sale was void.

Indeed, it is believed that no Title Company would, based on the foregoing facts which are undisputed, certify that the Trustee's Deed of Pledger would pass good title.

II.

The Acceleration Clause of the Installment Note Does Not Become Operative on a Default of One Day and the History of the Payments and the Other Facts in This Case.

Appellant maintains by exhibits and affidavit that the check was written one day after payment was due and mailed shortly thereafter. These statements must be accepted as true for the purposes of the motion for summary judgment. Under these facts, it is unconscionable for a Court of Equity to declare a default, thus allowing for the operation of an acceleration clause and foreclosure. This is particularly so where the debt owed to American is secured by a valuable piece of land so that there is no cause for concern insofar as security is concerned if payment is late. To permit such an interpretation of acceleration clauses to be the law would result in probably as much as one half of the encumbered landowners in this jurisdiction being suddenly confronted

with paying off their installment indebtedness all at once or suffer foreclosure. This would not only create havoc and untold economic hardship but be against public policy. Nevertheless this is precisely the logical extension of the Trial Court's ruling when it stated (JA 52):

> THE COURT: What was the date of the August payment?
>
> MR. BERLIN: August 25th.
>
> THE COURT: One day late, from the check itself?
>
> MR. BERLIN: Yes, sir.
>
> THE COURT: There was a default right then, wasn't there?
>
> MR. BERLIN: If the Court will take the position we are in default for one day, then we obviously were.
>
> THE COURT: I do take the position. That is exactly the agreement you entered into, that you would pay monthly on the 25th day of each month.
>
> MR. BERLIN: Your Honor, in my opinion these instruments must be construed in a manner fair to both parties. And to be one day late is not the type of default which should cause an acceleration of the debt.
>
> THE COURT: Let's you and I have an understanding. I construe it to be a default. Let us go from there.

And when the Court stated on conclusion of the hearing:

> The main thing is there was a default on August 26th and that was sufficient. (JA 61)

Courts throughout the land have ruled that, as a matter of equity, acceleration clauses must be construed in a liberal manner. In *The Clark-Robinson Corp. v. Jet Enterprises, Inc., et al.*, 159 N.Y.S. 2d 214, 216 (1957), the Supreme Court of New York stated:

> . . . It may be unconscionable to insist upon a strict adherence to the letter of the agreement where under all the circumstances the default is cured, the mortgagee is not prejudiced and his security is not impaired and where a strict enforcement of the acceleration clause would irreparably injure the mortgagor.

In *Bischoff v. Rearick,* Civ. App. (Tex.), 232 S.W. 2d 174 (1950), the Court held that even though there is a provision for the acceleration of the debt, to be exercised at the discretion of the noteholder, a Court of Equity will not permit the exercise of such a provision where the effect would be unjust and oppressive. In *Jernigan v. O'Brien,* 303 S.W. 2d 515 (Tex.), the Texas Court of Civil Appeals quoted from the *Bischoff* case, *supra,* with approval, as follows:

> It seems now to be the established law and approval by the Supreme Court that before the accelerated provision may be resorted to and the whole debt matured, demand must first be made for any installment due on the debt and an opportunity given to pay the installment before the acceleration of the entire debt for failure to pay such installment. [See also *United States v. Forrester, et al.,* 118 F. Supp. 411, 412 (1954).]

The law in this jurisdiction is well settled, where the settler under a deed of trust has been taken advantage of by the trustee and noteholder. See, *Royal v. Yudelevit,* 106 U.S. App. D.C. 1, 268 F.2d 577 (1959), *Eden v. Lauriat,* 106 U.S. App. D.C. 256, 271 F. 2d 839 (1959), and Pomeroy's Equity Jurisprudence, Vol. 1, Sec. 398 *et seq.* See also "Acceleration Provisions in Time Paper," by Zachariah Chafee, Jr., 32 Harv. L. Rev. 747, at p. 767 *et seq.*

The Trial Court should not declare a default because of one day's delay where the appellees have, by their previous actions, induced appellant to believe that it may be a few days late in its payments without incurring the drastic action which was taken at the end of 1963. Since the question of what amounts to justified reliance is primarily a question of fact to be decided at trial, there are few guidelines set down in this area aside from the general principles mentioned above. However, the Supreme Court of New York has had a number of occasions to rule on the question. In *Scelza v. Ryba,* 169 N.Y.S. 2d 462 (1957), it held that as a result of receiving four late payments without objection the mortgagee was estopped from employing the acceleration clause in the

agreement for the fifth late payment. In *Winker v. Robinson*, 233 N.Y.S. 2d 981, 987 (1962), the Court stated:

> He (mortgagee's assignee) may not refuse to accept proper payment of principal and interest according to the terms of the bond and mortgage tendered a few days, and less than 30, after the specified due date in order to claim a technical default in order to foreclose a mortgage concerning which time was never considered of the essence . . .

Judge Hart of the U. S. District Court for the District of Columbia granted an injunction to stop a foreclosure on the same basic grounds. See C.A. No. 1808-60. In that case payments began on the 31st of the month of June and were to be paid every month on the 31st. The June payment was 5 days late; July, 4 days late; August 1 day late; and September 4 days late. The October payment was not made on October 31. On November 2 mortgagee elected acceleration and November 4 mortgagor tendered the installment for October. Judge Hart said:

> It would be unconscionable to permit defendants to accelerate the balance due on the note and to foreclose on the deed of Trust because of the two days late payment when defendants without objection had accepted all prior payments a few days late.

The question of justified reliance is a question of fact and, when in dispute, should not be decided on summary judgment.

Finally, appellant should not have been allowed to accelerate upon default because of the almost universally held rule that when a mortgagor is late in his payment, he may nevertheless prevent the operation of an acceleration clause if he tenders payment of the amount due before the mortgagee elects to accelerate:

> Although there is authority to the contrary, the prevailing rule is to the effect that a tender of arrears due on a mortgage containing an acceleration clause, made before the holder of the mortgage has exercised his option to declare the entire amount of the debt due, prevents the exercise of such option. This

> is true whether the default was in relation to principal, interest, or taxes. (36 *Am. Jur.* 887, 888, ¶ 400.) See also *C.J.S.* Mortgage § 495 (6), p. 797; *Blackman v. Edison,* 221 N.Y.S. 2d 411, 412 (1961); *Gold v. W. Vanden Brul,* 211 N.Y.S. 2d 756, 759 (1961); *Peter Fuller Enterprises, Inc. v. Manchester Savings Bank, et al.,* 152 A.2d 179, 181-2, Supreme Court of New Hampshire (1959); *River Holding Co. v. Nickel et ux.,* 62 So. 2d 702, Supreme Court of Fla. (1952).

III.

The Pleadings of Both Sides Together With the Supporting Affidavits and Exhibits Clearly Shows That Genuine Issues of Fact Exist for Trial Determination.

The law on the summary judgment doctrine has been recently restated by the Supreme Court of the United States in the case of *Poller v. Columbia Broadcasting,* 360 U.S. 464 (1961) where, in the course of its opinion, the Court said:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case . . . show that (except as to the amount for the damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . It is only when the witnesses are present and subject to cross-examination that their credibility, and the weight to be given to their testimony, can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice.

There are many factual issues in this case which are disputed and which are essential to the proper determination of the case.

First of all, it is unclear as to whether the appellant was more than one day late in making payment for August. Appellant maintains that payment was made either August 26, 1963 or "shortly thereafter." The date is important since, so long as payment was made before

September 12, the date of appellees' notice of acceleration, that acceleration is ineffective because it is cured by prior tender. See *C.J.S.* on Mortgages, *supra*, and 36 Am. Jur. *supra*.

Secondly, the question of whether or not appellees' actions in accepting late payments was sufficient to induce appellant to believe that it was secure in making late payments is a question of fact which must be resolved by the jury.

Third, the undisputed facts show that American, through its local attorneys, accepted cashier's checks in payment of the late installment payments subsequent to the election of acceleration and did not return them until two days before the foreclosure sale took place. Thus appellant believes that the noteholder by this acceptance waived the acceleration clause. In any event the question must be decided on only by a trial.

IV.

A Fiduciary With Conflicting Interest Has the Burden of Proving That He Has Been Faithful to His Trust.

The law applicable to the duty of a fiduciary to remain clear of conflicting interest in the administration of his trust, has been established in this jurisdiction by a long line of decisions of the Supreme Court and of this Court.

The following cases furnish ample evidence in support of such assertion:

Clark v. Freedman's Savings Trust Co., 100 U.S. 149 (1879):
Spruill v. Ballard, 61 App. D.C. 112, 58 F.2d 517, 519 (1932);
Hollman v. Ryan, 61 App. D.C. 10, 56 F.2d 307 (1932);
Kerr v. Livingston, 65 App. D.C. 291, 83 F.2d 316 (1936);
Realty Investment, Etc. v. H. L. Rust Co., 71 App. D.C. 213, 109 F.2d 456 (1939);
Sheridan v. Perpetual Building Association, 112 U.S. App. D.C. 82, 299 F.2d 463 (1962);
Sheridan v. Perpetual Building Association, 116 U.S. App. D.C. 205, 322 F.2d 418 (1963); and

Earll v. Picken, 72 App. D.C. 91, 113 F.2d 150 (1940).

In *Clark v. Trust Co., supra,* the Supreme Court, in speaking of the duty of faithful performance of the trust of a fiduciary, said:

> It is true that his relation to the company would make it the duty of the court to scrutinize very closely all that he did in the execution of the trust . . . .

On the first appeal in the case of *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82, *supra,* where the complaint sought an accounting and judgment upon any amount found due from the owner of the note and the trustees, and Samuel Scriviner was both counsel for Perpetual and co-Trustee on the deed of trust, this Court stated, at page 84 of its opinion, that:

> When it is shown that a fiduciary has conflicting interest, ancient principles require him to bear the burden of proving that he has been faithful to his trust. It does not clearly appear to us that the trial judge applied that Rule to this case, as it should have been, or that he scrutinized the conduct of the trustees with the care required by the Clark case quoted above. Nor should the lending institution be permitted to benefit from any breach of trust by one of its officers or agents in respect of the borrower. As to whether such a breach has in fact occurred, we express no opinion; that may be determined at a hearing conducted with due regard for the principles stated in this opinion, and at which the District Court may permit the introduction of additional evidence.

On the second appeal of the *Sheridan* case, 116 U.S. App. D.C. 205, *supra,* this Court said:

> But Sheridan is not to be charged with knowledge of the trustees' connection with Perpetual, which were disqualifying if undisclosed, merely because he did not take the stand and deny such knowledge. The trustee had the burden of showing he was fully informed. They did not do so, nor did they call him as a witness although he was under subpoena.

This Court further stated:

> In presuming to act as trustee without disclosing to Sheridan their close association with Perpetual, Scriviner and Cromwell violated in the very beginning, their fiduciary duty to the borrower. Their failure to disclose was a continuous violation, for if at any time Sheridan had been told of their disability he could have demanded their removal and we think would have been entitled to relief.

It is readily seen, therefore, from an analysis of the foregoing cases, that concealment or lack of knowledge in the owner of the property of the close relation of the Trustee to the owner of the note, bears a 'badge of fraud'. And that the action of the Trustees may be set aside and new Trustee Appointed.

The law in the District of Columbia on this question has been summarized in the American Law Reports, volume 138, at page 1022, and the following pages. As is pointed out, they key to the cases is whether or not the close relationship between the noteholder and the trustee is disclosed to the maker of the note.

The relationship of client and attorney, while never specifically decided in this jurisdiction, is so close as to obviously fall within the law laid down in the following decisions of this Court. In *Spruill v. Ballard*, 61 App. D.C. 112, 58 F.2d 517 (1932), the wife owned the note and the husband was the undisclosed trustee. The Court held the trustee disqualified to perform his duties in a disinterested and impartial manner. In *Kerr v. Livingstone*, 65 App. D.C. 291, 83 F.2d 316 (1936), the son was the trustee and the Court held that he could not act as Trustee. In *Stokes v. Hinden*, 66 App. D.C. 34, 85 F.2d 200 (1936), the Trustee was an employee of noteholder's attorney, and this Court would not permit him to act.

The widespread use of Trustees associated in some manner with the noteholder apparently led this Court to lay down the rule which is dispositive in favor of appellant of this case when in *Canelacos v. Hollway*, 75 U.S. App. D.C. 58, 123 F.2d 934 (1941), it stated:

> We have repeatedly pointed out the impropriety of the exercise of a power of sale under a deed of trust by a trustee who is, or is associated with the owner of the debt secured. The conflict between such a trustee's interest and his duty to the debtor has led us to restrain such sales and substitute a disinterested trustee. Similarly, when a trustee has failed to disclose his interest to the debtor, we have held a sale to the trustee's nominee to be wrongful.

CONCLUSION

By reason of the authorities cited above and the allegations of the complaint, coupled with the affidavits and exhibits of the appellant, the latter urges this Court to reverse the judgment entered below and remand the cause for trial on the merit.

Respectfully submitted,

KURT BERLIN

Southern Building
Washington, D. C. 20005

Attorney for Appellant

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JOINT APPENDIX

[Filed Jan. 17, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Civil Division)

HAR-RICH REALTY CORPORATION a D. C. corporation 1415 K Street, N.W. Washington, D. C. Plaintiff v. AMERICAN CONSUMER INDUSTRIES, INC., a body corporate Serve: C. T. Corporation Systems 1918 - 16th Street, N. W. Washington, D. C. Defendant No. 1 CHARLES E. PLEDGER, JR. 925 Washington Building Washington, D. C. Defendant No. 2	Civil Action No. 134-64

COMPLAINT TO SET ASIDE FORECLOSURE SALE AND FOR DAMAGES

1. Jurisdiction of the Court herein is based upon Title 11, Section 301, et seq. of the District of Columbia Code.

2. Plaintiff is a District of Columbia corporation in good standing and the owner of 5,280 square feet of unimproved land located on the Northwest Corner of Third and K Streets, N. W., District of Columbia, and further designated as and being original Lot 1 in Square 526 in the District of Columbia.

3. Defendant No. 1 is the holder of a first deed of trust promissory note secured by the aforementioned realty. Defendant No. 2 is one

of the two trustees named in the Deed of Trust securing the aforesaid realty. Said Deed of Trust is dated the 25th day of November, 1958, and recorded among the Land Records of the District of Columbia in Liber 11151 at folio 470 et seq.

4. Defendants advertised the aforesaid property for foreclosure sale on December 10, 12, 14, 17, and 19, 1963, in spite of the fact that all payments required to be made on said note had been paid and the note was current.

5. Plaintiff avers that the said foreclosure sale is void for the following reasons:

(a) Defendant No. 2, as trustee, is closely associated with Defendant No. 1, the noteholder, in that his firm represents Defendant No. 1 in this foreclosure action and other matters as legal counsel and said fact was not disclosed to the Plaintiff and thus the exercise of the power of sale is improper.

(b) The Defendants brought the foreclosure after all payments of installments due on the note had been tendered for payment.

(c) Defendant No. 2, one of the two trustees, was vested with the property in trust as joint tenant with the late Randolf C. Richardson, who resigned as trustee on or about May, 1962, upon his appointment to the bench. No substitution of trustee has taken place and thus, Defendant No. 2 has no power to convey the property or exercise the power of sale.

6. Plaintiff avers that the exercise of the power of sale under the aforesaid Deed of Trust is contrary to public policy, improper and voidable and the Plaintiff has heretofore tendered to Defendant No. 1 all sums lawfully due and herewith renews its tender and the tender of any real estate taxes due.

7. The Defendants who participated in or caused the aforesaid advertisement and foreclosure to be published and made, knew or had reason to know that said advertisement and foreclosure were wrongful and their acts in connection with said advertisement and foreclosure constituted willful and malicious conspiracy and defamation and slander of title.

8. By reason of the foregoing unlawful, wrongful, willful and malicious acts of the Defendants, the Plaintiff has sustained damages in the sum of $250,000.00.

WHEREFORE, the premises considered, the Plaintiff prays:

1. That the foreclosure sale of December 20, 1963, be set aside.

2. Judgment against the Defendants for compensatory damages in the sum of $100,000.00 and punitive damages in the sum of $150,000.00, besides costs.

3. And for such other and further relief as to the Court may seem just and proper.

HAR-RICH REALTY CORPORATION
BY /s/ Delores G. Davis

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

Plaintiff demands trial by jury on all issues herein.

/s/ Kurt Berlin

[Filed Feb. 10, 1964]

MOTION TO DISMISS

Comes now the defendant, AMERICAN CONSUMER INDUSTRIES, INC., by its counsel herein, and moves this Court to dismiss the action as to it, and for grounds therefor says:

1. The Complaint fails to state a claim upon which relief may be granted.

2. An indispensable party has not been made party to the action.

JACKSON, GRAY & LASKEY

/s/ Austin P. Frum
Attorneys for defendant,
American Consumer Industries, Inc.

[Filed Feb. 10, 1964]

MEMORANDUM OF POINTS OF AUTHORITY IN SUPPORT OF DEFENDANT AMERICAN CONSUMER INDUSTRIES' MOTION TO DISMISS

1. The Complaint does not allege that any sale has taken place. Mere advertising of a sale would not constitute a cause of action in the absence of some allegation of special damage. In this case for aught that appears in the Complaint, there has been no sale, the plaintiffs still own their property and have therefore suffered no loss. The Complaint should be dismissed for failure to state a claim upon which relief may be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.

2. If the Complaint be said to have alleged, by implication, a foreclosure sale, then the plaintiff has failed to make the purchaser at that sale a party. Such a person would be an indispensable party to a proceeding to set aside a foreclosure sale, Shields v. Barrow, 17 How.(U.S.) 129, 15 L.ed. 158 (1855); F.2d 539 (1940), and the absence of such party is grounds for dismissal under Rule 12(b)(7), Federal Rules of Civil Procedure.

JACKSON, GRAY & LASKEY

BY:
/s/ Austin P. Frum
Attorneys for
American Consumer Industries, Inc.

[Filed Feb. 28, 1964]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Come now the defendants, by their attorneys, and move this Honorable Court to enter summary judgment under Rule 56, of the Federal Rules of Civil Procedure, in favor of both defendants herein and as grounds therefor state that, on the undisputed facts, the defendants are entitled to

judgment as a matter of law, all as more fully set forth in the affidavit of Justin L. Edgerton, the Statement of Undisputed Facts and the Memorandum of Points and Authorities attached hereto.

JACKSON, GRAY & LASKEY

By:
/s/ Austin P. Frum
Attorneys for Defendants,
American Consumer Industries, Inc.
and Charles E. Pledger, Jr.

* * *

[Certificate of Service]

[Filed Feb. 28, 1964]

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

It is undisputed that the plaintiff is the maker of a promissory note secured by a Deed of Trust and that the said promissory note contains the following clause:

> "And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event, the unpaid balance of the aforesaid principal sum and the accrued interest shall at the option of the holder hereof at once become and be due and payable."

It is likewise undisputed that the plaintiff was frequently in default in its payments of the monthly installments and that, in August, 1963, the defendant, American Consumer Industries, Inc., (hereinafter called "American") exercised its option to declare the entire principal sum of the note together with the interest thereon to be due and payable. The plaintiff has at no time tendered payment of this principal sum together with the accrued interest.

Under the Negotiable Instruments Law in force in the District of Columbia, Title 28, §103, District of Columbia Code (1961 Edition), an acceleration clause such as the one quoted above is valid. See Beutel's Brannan Negotiable Instruments Law, pp 236-239 (7th Ed. 1948) and Annotation, 159 A.L.R. 1077, 1079. Such acceleration clauses are invariably upheld by the courts, see, for example, Chicago Railway Equipment Co. v. Merchant's National Bank, 136 U.S. 268, 285, 34 L. ed. 349, 354 (1890); Gramatan National Bank & Trust Co. v. Backman, 30 N.J. Super. 349, 104 A. 2d 729 (1954). Only where such acceleration clauses have provided for interest down to the date of maturity of the note or other similar heavy penalties have courts intervened and modified such clauses. A-Z Servicecenter v. Segall, 334 Mass. 672, 138 N.E. 2d 266 (1956). The above-quoted acceleration clause provides for interest only to the date of payment and is accordingly valid and enforceable. Thus, defendant American properly exercised its option to declare the entire balance of the note due, together with the interest thereon, in August, 1963. Upon plaintiff's failure to pay the balance and interest, the defendant American properly instructed the trustee to sell the property at foreclosure.

In addition to its failure to pay the balance of the note, the plaintiff has also failed to pay the District of Columbia real estate taxes on the subject property for the years 1962, 1963 and the first half of 1964. Such failure to pay the taxes placed American's security interest in the property in great danger and is, in itself, ample grounds for foreclosure. Indeed, on a prior occasion, the property had been sold for unpaid property taxes for the second half of the year 1961. The Deed of Trust provides that the grantor, Har-Rich Realty Corporation, agrees to pay all taxes due upon the property and its failure to comply with this provision is grounds for foreclosure in accordance with the terms of the Deed of Trust.

Plaintiff, in paragraph 6 of its Complaint, alleges that it tenders "any real estate taxes due." A mere recitation of words, however, does not amount to a valid tender:

> "The word 'tender' is usually held to mean that the thing offered must be actually produced and placed in such position that control over it is relinquished by the tenderer so that the tenderee may reach out and lay hold on it." Kerr v. United States, 71 App. D.C. 222, 223, 108 F. 2d 585, 586 (1939).

No such tender has been made or even attempted by the plaintiff herein. Moreover, even if a valid tender of all sums due had been made at the time of the filing of the Complaint herein, tender of payment after a foreclosure sale does not and cannot invalidate or otherwise defeat the sale. West Lumber Company v. Schmuck, 51 S.E. 2d 644 (Ga. 1949).

Thus, American was justified in requesting the trustee to foreclose on two separate grounds: (1) Plaintiff's failure to tender the entire balance of the note due in accordance with the acceleration clause and (2) plaintiff's failure to pay the real estate taxes.

Plaintiff's contention that defendant Pledger, as the remaining trustee after the resignation of the late Randolph C. Richardson, could not exercise the power of sale is without foundation. The law is clear that powers conferred upon two or more trustees may be exercised by a remaining trustee in the absence of a contrary provision in the trust instrument. Stokes v. Hinden, 66 App. D.C. 34, 35, 85 F.2d 200, 201 (1936); Restatement of Trusts, Sec. 195; Scott on Trusts, Sec. 195 (2d ed. 1956).

JACKSON, GRAY & LASKEY

By: /s/ Austin P. Frum
Attorneys for American Consumer Industries, Inc. and Charles E. Pledger, Jr.

* * *

[Filed Feb. 28, 1964]

STATEMENT OF UNDISPUTED FACTS PER LOCAL RULE 9(h)

1. The plaintiff, Har-Rich Realty Corporation (hereinafter called "Har-Rich"), purchased Lot 1, Square 526, improved by the premises 301 K Street, N. W., in the District of Columbia from American Consumer Industries, Inc., a defendant herein, then doing business as American Ice Company (hereinafter called "American"), on November 25, 1958.

2. In partial payment for the said parcel of realty, Har-Rich executed a promissory note in the face amount of $35,000.00, with interest at the rate of 5% per annum payable in monthly installments of $350.00 on the 25th day of each month and containing a clause which gave the holder the option to declare the entire unpaid balance and interest thereon due and payable upon default in any installment, a copy of the said note being attached to the affidavit of Justin L. Edgerton filed herewith.

3. The said promissory note was secured by a deed of trust of even date naming Charles E. Pledger, Jr. and the late Randolph C. Richardson as Trustees, a copy of the said deed of trust being attached to the affidavit of Justin L. Edgerton filed herewith. At the time the said note and deed of trust were executed Har-Rich was aware that the said trustees were members of the law firm of Pledger & Edgerton and that the said firm represented American.

4. Randolph C. Richardson resigned as trustee upon his appointment as a judge of the Municipal Court for the District of Columbia (now the District of Columbia Court of General Sessions).

5. Beginning in July, 1961, and continuing down to the date of the foreclosure sale, December 20, 1963, Har-Rich was frequently in default in its monthly payments of the said promissory note and of District of Columbia real estate taxes on the said property, all as more fully set forth in the affidavit of Justin L. Edgerton filed herewith.

6. Har-Rich failed to make its monthly payment due on August 25, 1963, and American accordingly declared the entire balance of the note

together with the accrued interest thereon due and payable in accordance with the acceleration clause. Har-Rich attempted to tender monthly payment which tender was refused by American but Har-Rich has at no time tendered or purported to tender payment in full of the balance due on the note together with the interest accrued thereon, and, moreover, Har-Rich has failed to pay the District of Columbia real estate taxes on the said property for the years 1962, 1963 and the first half of 1964.

7. Because of Har-Rich's chronic delinquency in repayment of the note, its refusal to tender payment in full of the note as demanded in accordance with the acceleration clause and its failure to pay the District of Columbia real estate taxes as aforesaid which endangered American's security interest in the property, American requested the remaining trustee, Charles E. Pledger, Jr., to sell the property at foreclosure.

8. The property was sold at a foreclosure sale on December 20, 1963; the said foreclosure sale was duly advertised, Har-Rich was duly notified and kept informed and the said sale was in all respects proper and in accordance with the deed of trust.

JACKSON, GRAY & LASKEY

BY: /s/ Austin P. Frum
Attorneys for American Consumer
Industries, Inc. and
Charles E. Pledger, Jr.

* * *

[Filed Feb. 28, 1964]

AFFIDAVIT OF JUSTIN L. EDGERTON

JUSTIN L. EDGERTON, being duly sworn, on oath deposes and says:

That he is a member of the Bar of the District of Columbia and a partner in the law firm of Pledger & Edgerton, Washington Building, Washington, D. C.; that at all times pertinent hereto the said firm was

Washington counsel for American Consumer Industries, Inc., a corporation, one of the defendants herein, formerly doing business under the name American Ice Company, and hereinafter called American; that he makes this affidavit on personal knowledge; that on November 25, 1958, American (then doing business under the name of American Ice Company) conveyed to Har-Rich Realty Corporation (hereinafter called "Har-Rich"), the plaintiff herein, Lot 1, in Square 526, improved by the premises 301 K Street, N. W., in the District of Columbia; that in partial payment for the said parcel of realty Har-Rich executed a promissory note in the face amount of $35,000.00, with interest at the rate of 5% per annum payable in monthly installments of $350.00 on the 25th day of each month and further providing that the entire balance of principal and interest would be due and payable in full on December 15, 1965, a copy of the said note being attached hereto as Exhibit "1"; that the said note was secured by a deed of trust naming Charles E. Pledger, Jr. and Randolph C. Richardson as Trustees, a copy of the said deed of trust being attached hereto as Exhibit "2"; that negotiations leading up to the said conveyance were carried out on behalf of American by the late Randolph C. Richardson, a member of the firm of Pledger & Edgerton; that at the time of the conveyance and execution of the said promissory note and deed of trust Har-Rich was aware that Randolph C. Richardson and Charles E. Pledger, Jr. were members of the firm of Pledger & Edgerton and that the said firm represented American; that Har-Rich failed to make a timely monthly payment on July 25, 1961, and again on October 25, 1961, and that it was necessary for American to write Har-Rich on both occasions demanding payment, copies of the said letters being attached hereto as Exhibits "3" and "4", respectively; that Har-Rich further failed to make timely payments due on December 25, 1961, January 25, 1962 and February 25, 1962, and that on February 28, 1962, American, through its attorneys, notified Har-Rich that because of the default in the last three monthly installments American was exercising its option under the said note and deed of trust to declare the entire principal sum and accrued interest

thereon, i.e., $27,092.95, together with accrued interest of 5% per annum from September 25, 1961, due and payable at once, a copy of the said letter being attached hereto as Exhibit "5"; that thereafter Har-Rich paid the monthly installment due as aforesaid but did not pay the full balance of principal and interest as demanded; that Har-Rich was again delinquent in making its payment due May 25, 1962; that Har-Rich failed to make timely payment of the District of Columbia real estate taxes for the second half of the year 1961 as it was required to do under the deed of trust and that the said failure to pay the real estate taxes resulted in a sale of the aforesaid property for unpaid taxes to Sanmarc Investment Company; that Har-Rich further failed to make timely payment of the District of Columbia real estate taxes due in September, 1961, and March, 1962, and that American by its attorneys, advised Har-Rich of this delinquency by a letter dated June 26, 1962, a copy of which is attached hereto as Exhibit "6"; that Har-Rich further failed to make timely payment of the installment due on June 25, 1962, and that American, through its attorneys, advised Har-Rich of this delinquency by a letter dated July 12, 1962, a copy of which is attached hereto as Exhibit "7"; that on July 16, 1962, American, with its own funds, redeemed the aforesaid property from a sale for taxes, a copy of the redemption certificate being attached hereto as Exhibit "8"; that American, by its attorneys, demanded reimbursement for the sum of $180.37 expended in redemption of the said property from the tax sale by a letter dated July 20, 1962, a copy of which is attached hereto as Exhibit "9"; that no reimbursement having been made by Har-Rich in accordance with the demand contained in the aforesaid letter, the property was advertised for foreclosure sale in August, 1962, and the said sale was set for September 6, 1962; that, prior to the date of the said foreclosure sale Har-Rich tendered payment of the installments due on the note July 25 and August 25, 1962, the expenses incurred in connection with the redemption from the tax sale and the costs incurred in connection with the foreclosure sale and, accordingly, the foreclosure sale was cancelled; that Har-Rich failed to make timely payment

of the installments due on March 25, April 25, May 25 and June 25, 1963, and that payment of the said installments was made in August, 1963, only after repeated demands and the taking of steps to bring about a foreclosure sale; that Har-Rich failed to make its monthly payment due on August 25, 1963, and that, accordingly, American declared the entire balance of the note together with the accrued interest thereon due and payable in accordance with the acceleration clause; that Har-Rich attempted to tender payment of the August 25th payment but that the said tender was refused because of the chronic delinquency in payment of this note and the failure of Har-Rich to pay the District of Columbia real estate taxes for the years 1962, 1963 and the first half of 1964; that thereafter, Har-Rich attempted to tender the monthly payments but that Har-Rich has never attempted or purported to tender payment of the entire principal and the interest thereon in accordance with the acceleration provision of the note and that the District of Columbia real estate taxes for the years 1962, 1963 and first half of 1964 still remain due and payable, a copy of the tax certificate being attached hereto as Exhibit "10"; that by reason of the aforesaid delinquencies the property was sold by the trustee, Charles E. Pledger, Jr., on December 20, 1963, and that the said sale was duly advertised and was proper in all respects.

/s/ Justin L. Edgerton

[JURAT the 28th day of February, 1964.]

[Filed Feb. 28, 1964]

EXHIBIT "1"
[Attached to Edgerton's Affidavit]

DEED OF TRUST NOTE–INSTALLMENT

Given for deferred purchase money and secured by 1st deed of trust on Lot 1, Square 526, Premises No. 301 K Street, N.W., Charles E. Pledger, Jr. and Randolph C. Richardson, Trustees.

Subject to a first trust for $ _____, Dated _____, 19__

at _____% Placed by _____

$35,000.00 November 25, 1958

For Value Received Har-Rich Realty Corporation promises to pay to the order of American Ice Company the sum of Thirty-five Thousand & n0/100th DOLLARS, with interest until paid at the rate of five (5) per centum per annum.

Said principal and interest payable in monthly installments of Three Hundred Fifty & no/100th ($350.00) DOLLARS (with the privilege of making larger payments in any amount), on the 25th day of each and every month after date, until paid; each installment, when so paid, to be applied: first, to the payment of the interest on the amount of principal remaining unpaid, and the balance thereof credited to the principal.

And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event, the unpaid balance of the aforesaid principal sum and accrued interest shall at the option of the holder hereof at once become and be due and payable. The entire balance of principal and interest all due and payable in full December 15, 1965.

[JURAT]

HAR-RICH REALTY CORPORATION
By: /s/ Frederic Richmond
President

ATTEST: /s/ Sol Oshinsky
Secretary

Address 220 K Street, N. W.

Exhibit "1" (Cont'd)

PAYMENTS ON ACCOUNT OF ABOVE NOTE, AND INTEREST, ARE ACKNOWLEDGED AS FOLLOWS:

Date of Payment	Interest Due	To Principal	Balance Principal Due	Date of Payment	Interest Due	To Principal	Balance Principal Due
12/20/58	145.83	204.17	34,795.83	10/29/60	126.27	223.73	30,082.44
1/21/59	144.98	205.02	34,590.81	11/7/60	125.34	224.66	29,857.78
2/14/59	144.12	205.88	34,384.93	12/17/60	124.41	225.59	29,632.19
3/7/59	143.26	206.74	34,178.19	1/12/61	123.47	226.53	29,405.66
5/5/59	142.40	207.60	33,970.59	2/13/61	122.52	227.48	29,178.18
5/16/59	141.54	208.46	33,762.13	3/6/61	121.58	228.42	28,949.76
6/18/59	140.67	209.33	33,552.80	4/15/61	120.62	229.38	28,720.38
7/8/59	139.80	210.20	33,342.60	6/13/61	119.67	230.33	28,490.05
8/3/59	138.92	211.08	33,131.52	7/22/61	118.71	231.29	28,258.76
10/5/59	275.21	424.79	32,756.73	9/7/61	354.19	695.81	27,562.95
11/16/59	136.27	213.73	32,493.00	12/5/61	229.70	470.30	27,092.65
12/8/59	135.38	214.62	32,278.38	5/31/62	564.45	1,185.55	25,907.10
1/12/60	134.49	215.51	32,062.87	6/5/62	103.99	246.01	25,661.09
2/5/60	133.59	216.41	31,846.46	7/10/62	106.92	243.08	25,418.01
3/5/60	132.69	217.31	31,629.15	8/31/62	211.82	488.18	24,929.83
4/9/60	131.79	218.21	31,410.94	10/6/62	103.87	246.13	24,683.70
5/9/60	130.88	219.12	31,191.82	10/13/62	102.85	247.15	24,436.55
6/15/60	129.97	220.03	30,971.79	2/6/63	305.46	744.54	23,692.01
7/26/60	129.05	220.95	30,750.84	5/4/63	98.72	251.28	23,440.73
8/8/60	128.13	221.87	30,528.97				
9/6/60	127.20	222.80	30,306.17				

[Filed Feb. 28, 1964]

EXHIBIT "2"
[Attached to Edgerton's Affidavit]

THIS DEED

Made this 25th day of November, A.D. 1958, by and between Har-Rich Realty Corporation, a corporation organized under the laws of the District of Columbia, party of the first part, Charles E. Pledger, Jr. and Randolph C. Richardson, trustees, parties of the second part:

WHEREAS, said party of the first part is justly indebted unto American Ice Company in the full sum of Thirty-five Thousand & no/100th ($35,000.00) Dollars deferred purchase money, for which amount it has given its one certain promissory note of even date with interest until paid at the rate of five per centum per annum; said principal and interest payable in monthly installments of $350.00 (with the privilege of making larger payments in any amount), on the 25th day of each and every month after date. Each installment when so paid to be applied first to the payment of the interest on the amount of principal remaining unpaid and the balance thereof credited to the principal. Said note provides for the usual acceleration of principal and interest in event of default in any such installment. The entire balance of principal and interest being due and payable in full December 15, 1965.

This deed of trust being re-recorded for the purpose of amending the same to include the above maturity date of the note described above.

AND WHEREAS, the party of the first part desires to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said parties of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and all money which may be advanced as provided herein, with interest on all such costs and advances from the date hereof.

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that the party of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to it in hand paid by the parties of the second part, the receipt of which, before the sealing and delivery by these presents, is hereby acknowledged, has granted, and does hereby grant unto the parties of the second part the following described land and premises, situate in the District of Columbia: known and distinguished as Original Lot 1 in Square 526, together with all the improvements in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the party of the first part, of, in, to, or out of the said land and premises.

IN AND UPON THE TRUSTS, NEVERTHELESS, hereinafter declared; that is to say: IN TRUST to permit said party of the first part, its successors or assigns, to use and occupy the said described land and premises, and the rents, issues, and profits thereof, to take, have, and apply to and for its sole use and benefit, until default be made in the payment of said promissory note hereby secured or any installment of interest thereon, when and as the same shall become due and payable, or any proper cost or expense in and about the same as hereinafter provided.

AND, upon the full payment of all of said note and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, charges, commission, half-commissions and expenses, at any time before the sale hereinafter provided for to release and reconvey the said described premises unto the said party of the first part, its successors or assigns, at its or their cost.

AND UPON THIS FURTHER TRUST, upon any default or failure being made in the payment of said note or of any installment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge, commission, or expense in and about the same, then and at any time

thereafter the said parties of the second part surviving trustee or the trustee acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisement as the parties of the second part or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost, of the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money;and of the proceeds of said sale or sales: FIRSTLY, to pay all proper costs, charges, and expenses, including all fees and costs herein provided for, and all moneys advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales; SECONDLY, to pay whatever may then remain unpaid of said promissory note, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note, be and become immediately due and payable at the election of the holder thereof; and, LASTLY, to pay the remainder of said proceeds, if any there be, to said party of the first part, its successors or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

AND, the said party of the first part does hereby agree at its own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid to keep the said improvements insured against loss by fire and extended coverage, in the name and to the satisfaction of the parties of the second part, or substituted trustee, in such fire insurance company or companies as the said parties of the second part may

select, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both in general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.

AND, it is further agreed that if the said property shall be advertised for sale, as herein provided and not sold, the trustee or trustees acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

AND, the said party of the first part covenants that it will warrant specially the land and premises hereby conveyed, and that it will execute such further assurances of said land as may be requisite or necessary.

IN TESTIMONY WHEREOF the said HAR-RICH REALTY CORPORATION hath on the 25th day of November, A.D. 1958, caused these presents to be signed by Frederic Richmond its Vice-President attested by Sol Oshinsky its Secretary and its corporation seal hereunto affixed; and doth hereby appoint Frederic Richmond its true and attorney in fact to acknowledge and deliver these presents as its act and deed.

HAR-RICH REALTY CORPORATION

By: /s/ Frederic Richmond
Vice-President [SEAL]

Attest:

/s/ Sol Oshinsky
Secretary.

Signed, sealed and delivered in the presence of –

TO WIT: DISTRICT OF COLUMBIA

I, J. George Gately, a Notary Public in and for the Said District do hereby certify that Frederic Richmond, who is personally well known to me as the person named as attorney in fact in the aforegoing Deed, bearing date on the 25th day of November, A.D. 1958, and hereto annexed, personally appeared before me in said District and as attorney in fact as aforesaid, and by virtue of the authority vested in him by said Deed, acknowledged the same to be the act and deed of Har-Rich Realty Corporation, the grantor therein.

GIVEN under my hand and seal this 25th day of November, A.D. 1958.

[Notarial Seal]

/s/ J. George Gately
Notary Public

I, Sol Oshinsky, Secretary of Har-Rich Realty Corporation, do hereby certify that the aforegoing deed of trust was executed in strict conformity with a resolution of the Board of Directors of the said corporation, a corporation organized under the laws of District of Columbia passed at a duly called meeting of said corporation, held on November 23, 1958.

/s/ Sol Oshinsky
Secretary

CORPORATION DEED OF TRUST

Har-Rich Realty Corporation
a D. C. Corporation,

TO

Charles E. Pledger, Jr.
Randolph C. Richardson,
Trustees.

Received for Record on the ____ day of _____, A.D. 19__ at ____ o'clock __M., and recorded in Liber No. 11151 at Folio 473, one of the Land Records for the _____ and examined by

John B. Duncan
Recorder.

Mail to:

Pledger, Edgerton & Richardson,
Attorneys at law,
Washington Building,
Washington 5, D. C.

[Filed Feb. 28, 1964]

EXHIBIT "3"

[Attached to Edgerton's Affidavit]

AMERICAN ICE COMPANY
375 Park Ave.
New York City 22

August 22, 1961

Har-Rich Realty Corporation
220 K Street, N. W.
Washington, D. C.

re: Mortgage dated November 25, 1958

Gentlemen:

Our books indicate that you have failed to meet your installment on account of the above mortgage held by us covering your premises at 3rd and K Street, N. W., Washington, D. C., due on July 25, 1961, in the amount of $350.00. A further payment of $350.00 will also be due and payable on August 25, 1961. We must request that you promptly remit the said installments to us in accordance with the terms and conditions of the mortgage in order to avoid the necessity of any further action.

Very truly yours,

/s/ Earle D. Barton
Secretary

EDB:ls
Enc.

cc: Mr. Randolph C. Richardson
Pledger, Edgerton & Richardson

[Filed Feb. 28, 1964]

EXHIBIT "4"
[Attached to Edgerton's Affidavit]

AMERICAN CONSUMER INDUSTRIES, INC.
375 Park Avenue
New York City 22

November 14, 1961

Har-Rich Realty Corporation
220 K Street, N. W.
Washington, D. C.

re: Mortgage dated November 25, 1958

Gentlemen:

It is again necessary that we call to your attention that you have failed to meet your installment on account of the above mortgage held by us covering your premises at 3rd and K Streets, N. W., Washington, D. C., which became due on October 25, 1961, in the amount of $350.00.

We must request that you promptly remit the said installment to us immediately.

It is also imperative that all future payments be rendered when they become due on the respective installment dates in accordance with the terms and conditions of the mortgage so that it will be unnecessary to continually contact you on this matter.

Very truly yours,

/s/ Earle D. Barton
Secretary

EDB:ls

cc: Mr. Charles E. Pledger, Jr.
Pledger and Edgerton

[Filed Feb. 28, 1964]

EXHIBIT "5"

[Attached to Edgerton's Affidavit]

February 28, 1962

Har-Rich Realty Corporation
220 K Street, N. W.
Washington, D. C.

Dear Sirs:

We are advised by American Ice Company that your note dated November 25, 1958 and secured by first deed of trust on Lot 1, Square 526, premises 301 K Street, N. W., is in default by reason of your failure to make payment of three installments due thereon, December 25, 1961, January 25, 1962 and February 25, 1962 in the sum of $350.00 each.

The said note expressly provides:

> "And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event, the unpaid balance of the aforesaid principal sum and accrued interest shall at the option of the holder hereof at once become and be due and payable."

In accordance therewith American Ice Company declares the principal balance due on said note of $27,092.95 together with accrued interest of 5% per annum from September 25, 1961 has become at once due and payable and in its behalf we accordingly make demand upon you for payment thereof.

Please communicate immediately upon receipt of this letter with this office as we shall otherwise be compelled to proceed with appropriate action to enforce collection without further notice to you.

Very truly yours,

Justin L. Edgerton

JLE:rh

[Filed Feb. 28, 1964]

EXHIBIT "6"
[Attached to Edgerton's Affidavit]

June 26, 1962

Har-Rich Realty Corporation
220 K Street, N. W.
Washington, D. C.

Dear Sirs:

At the request of American Ice Company, the holder of your note secured by first deed of trust on Lot 1, Square 526, premises 301 K Street, N. W., we have checked with the Office of the D. C. Assessor and have ascertained that failure to pay D. C. real estate taxes on this property has reached such a status that the security under the first deed of trust has become seriously endangered. The failure to pay the second half of the real estate taxes for the year 1961 has resulted in a sale of the property for unpaid taxes to Sanmarc Investment Company. The amount of this unpaid tax is $168.35 with interest at twelve percent (12%) since March 30, 1961, together with penalties and other charges in connection with the tax sale. In behalf of the holder of the note we demand that all amounts due under the 1961 assessment be paid not later than July 10, and that satisfactory notice of such payment be furnished this office. If such payment is not made by the date indicated, the holder of the note, in order to protect its interests, will be compelled to advance the payment thereof and add the amount so paid to the principal amount of the indebtedness as provided in the deed of trust.

We further find that no taxes have been paid for the tax year 1962 due in March and September, 1961. In behalf of the holder of the note we demand that payment of all such 1962 taxes be made not later than September 1 of this year and that satisfactory evidence of such payment be furnished to this office.

Very truly yours,

Justin L. Edgerton

JLE:rh

cc: Mr. Earle D. Barton, Secretary
American Consumer Industries, Inc.
375 Park Avenue
New York 22, New York

[Filed Feb. 28, 1964]

EXHIBIT "7"
[Attached to Edgerton's Affidavit]

July 12, 1962

Mr. Earle D. Barton, Secretary
American Consumer Industries, Inc.
375 Park Avenue
New York 22, New York

Re: Har-Rich Realty Corporation
Mortgage dated November 25, 1958
Premises – 3rd & K Streets, Washington, D. C.

Dear Mr. Barton:

You advised me by your telephone call that you had received the $350.00 payment from Har-Rich due June 25. I have not as yet, however, heard anything in response to my letter of June 26 demanding payment of real estate tax for the second half of 1961. I would therefore suggest that these taxes be paid and ask that you send me a check to the order of "D. C. Treasurer" in the sum of $175.44 which covers the tax plus 7% interest from the date of the tax sale plus $.20 recording fee. I will then present this check for payment and will forthwith make demand on Har-Rich for reimbursement as required by the provisions of the Deed of Trust.

Sincerely yours,

Justin L. Edgerton

JLE:rh

[Filed Feb. 28, 1964]

EXHIBIT "8"
[Attached to Edgerton's Affidavit]

Form A-5

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE
PROPERTY TAX DIVISION
REDEMPTION FROM SALE FOR TAXES

ONLY CASH, CERTIFIED
CHECK OR MONEY ORDER
WILL BE ACCEPTED IN
PAYMENT OF THIS ACCOUNT
2nd Half 1961
D. C. TREASURER

7-16-62

Square 526 Lot 1 Assessed to Har Rich Realty Corp.

Bill made by jr Compared by /s/ oc Sold to The Sanmarc Investment Co.

Redeemable within two years
from date of sale at the
Finance Office, D. C., Treasury
Division, Municipal Center,
Washington 1, D. C.

Justin L. Edgerton
925 Washington Bldg., N.W.-5

Date of Sale 1/12/62

For the amount of		$168.38
Interest at 1% per month or part thereof from date of sale	7%	11.79
Recording		.20
Total jt		$180.37

PAY TO THE D.C. TREASURER

Credit: 9826 Washington Redemption Fund.
Principal-Interest

[Rec'd Property Tax Division
Finance Office, D. C.
July 16, 1962]

[JUL-20-62 228 -CkA 180.37
PAID D. C. Treasurer]

[Filed Feb. 28, 1964]

EXHIBIT "9"
[Attached to Edgerton's Affidavit]

July 20, 1962

Har-Rich Realty Corporation
220 K Street, N. W.
Washington, D. C.

Dear Sirs:

Not having heard from you in response to my letter of June 26 wherein we demanded that all amounts due under the District of Columbia real estate tax assessment for 1961 be paid not later than July 10, and such payment not having been made, the holder of the first deed of trust has instructed me to pay, and I have paid, the amount due therefor, as evidenced by the enclosed thermofax copy of receipt of the Finance Office, Property Tax Division, showing redemption from sale for taxes of Lot 1, Square 526, in the total amount of $180.37.

In accordance with the provisions of the deed of trust this amount is added to the principal amount due on your indebtedness and demand is hereby made that reimbursement for the amount so advanced be made to the American Ice Company on or before August 1, 1962, any default of payment of which foreclosure proceedings will be instituted on this property pursuant to our present instructions from the holder of the first trust.

Very truly yours,

Justin L. Edgerton

JLE:rh
Enclosure

cc: Mr. Earle D. Barton, Secretary
American Consumer Industries, Inc.
375 Park Avenue
New York 22, New York

[Filed Feb. 28, 1964]

EXHIBIT "10"
[Attached to Edgerton's Affidavit]

C NO. 793575

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE
FP-139 PROPERTY TAX DIVISION

CERTIFICATE OF TAXES

Jackson, Gray and Laskey
1025 Connecticut Avenue, N. W.
Washington, D. C. 20006

On the following real estate, to wit: Lot 1, square 526, 5280 square feet, valued at $13,200, value of improvements, $ _____, assessed in the name of Har-Rich Realty Corporation, there now appears by the books and records of taxes and assessments to be due and unpaid as follows, with penalty and interest thereon as provided by law:

GENERAL TAXES

For year ending June 30, 1964 $330.00

1962 and 1963 real estate tax sold to Joseph S Hoover 1963 and 1964

*Cited as Courtesy.

SPECIAL ASSESSMENTS

No unpaid special assessment to February 26, 1964

WATER CHARGES AND SANITARY SEWER SERVICE CHARGES EXCEPTED.

The law does not require upon tax certificates any statement in regard to "pending" or prospective assessments. If this certificate bears reference to such "pending" assessments, it is noted simply as a courtesy, and the omission of notation of any "pending" or prospective assessment shall not be construed to give the recipient of this tax certificate, or any other person, any right or claim against the District of Columbia.

WITNESS my hand and seal of office the 27th day of February, 1964

Fee, $1.00, paid.

KENNETH BACK,
Finance Officer

By /s/ Roy L. Jones
Supervisor, Property Tax Records

[Filed March 18, 1964]

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, by its attorney, and in opposition to Defendants' Motion for Summary Judgment states:

1. That there are genuine issues of material fact;

2. That the Plaintiff takes exceptions to portions of Defendants' statement of undisputed fact; and

3. For such other reasons as are more fully set forth in the Points & Authorities, affidavits, and exhibits appended hereto and the statement of genuine issues to be filed pursuant to local Rule 9(h) prior to the hearing of this motion.

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

[Certificate of Service]

[Filed March 18, 1964]

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In order for the Defendants to exercise the acceleration clause of the promissory note, a default must occur. This default must be a current one. This is not the fact in this case. The appended affidavit clearly shows that at the time that Defendant American Consumer Industries, Inc., hereinafter called "American", elected to accelerate the note, no default existed. See Affidavit of C. M. Miller, appended hereto as Exhibit No. 1 and the copy of the check appended hereto as Exhibit No. 2, and letter from American dated September 12, 1963, attached hereto as Exhibit No. 3.

Indeed American, on August 5, 1963, accepted and cashed a check in the sum of $1,750.00 constituting the monthly installments for March,

April, May, June, and July, 1963. A copy of the check is attached hereto as Exhibit No. 4. Thus no default existed at the time that Defendants commenced foreclosure. In fact, as late as November 15, 1963, Justin L. Edgerton, attorney for American, directed the payments of the then due installments to be made to his office. See affidavit of Ethan Allen Turshen, a member of this Bar, attached hereto as Exhibit No. 5 with its appendix made a part hereof.

The contention of Defendants that the arrearages in the District of Columbia Real Estate taxes endangered American's security interest is without foundation in fact or law. American's security interest is jeopardized only when the purchaser of the delinquent real estate taxes applies for a tax deed. This cannot happen until two years from such sale, which at the earliest is January, 1965. D. C. Code 47-1013. See Exhibit No. 10 to affidavit of Justin L. Edgerton.

The Plaintiff who in October, 1963, had a complete change in stock ownership and officers was not aware of the real estate tax delinquency. The Defendants, if they were aware of it, and specifically the law firm of Pledger and Edgerton in their numerous telephone conversations, did not disclose this fact to Plaintiff until their letter of December 18, 1963, two days before the sale took place. See copy of letter attached hereto as Exhibit No. 6. It was also in that letter that the Defendants returned all the checks previously tendered to them.

Defendants are also mistaken when they state in the Points and Authorities in Support of their Motion for Summary Judgment on Page 2, "Such failure to pay the taxes . . . is in itself, ample grounds for foreclosure." The Deed of Trust (see Exhibit No. 2 of Affidavit of Justin L. Edgerton) which governs, states in regard to real estate taxes as follows:

> "And, the said party of the first part (Har-Rich Realty Corporation) does hereby agree at its own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid . . . and also to pay all taxes and assessments, both in general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust and that upon

any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment."

Failure to pay the taxes is therefore not a cause for foreclosure as Defendants allege.

In support of the Defendants' contention that the Defendant Pledger had the right to exercise the power of sale granted in the Deed of Trust, the Defendants cite the case of Stokes v. Hinden, 66 App. D.C. 34. The Stokes case deals with a substitution by the Court of a surviving trustee. The facts in the Stokes case are quite different from this cause of action. Here, although the co-trustee Richardson did pass away, he resigned as Trustee some years prior to his demise. Thus, at the time of his resignation, see letter from Pledger and Edgerton dated May 17, 1962, a copy of which is attached hereto as Exhibit No. 7, the joint tenancy created by Title 45, Section 614 of the D. C. Code was destroyed.

The Deed of Trust which governs in this case does not grant the right of resignation of a Trustee and his substitution without a Court order. It does, however, grant a surviving trustee the right to act alone, but of course, the intervening time period between R. C. Richardson's resignation and his demise destroys that right.

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

[Filed March 18, 1964]

EXHIBIT 1

[Attached to Plf's Points & Authorities]

AFFIDAVIT OF CECILE M. MILLER

CECILE M. MILLER, being duly sworn on oath deposes and says:

That until October, 1963, she was Assistant Secretary of Har-Rich Realty Corporation, a District of Columbia corporation, and in that capacity

she was responsible for the preparation of the checks, the payment and mailing thereof to American Consumer Industries, Inc., holders of the first trust.

That in that capacity, on August 26, 1963, she prepared and signed, check No. 561, made payable to the order of American Ice Company in the sum of $350.00, being the August installment on the said deed of trust note, a copy of said check being attached hereto. She further states that in the normal course of business, either on the same day or shortly thereafter, she mailed said check to American Ice Company, 43 Dyere Avenue, Long Island City, New York, and that said check has never been returned to her.

/s/ Cecile Marie Miller

[JURAT the 17th day of March, 1964]

[Filed March 18, 1964]

EXHIBIT 2

[Attached to Plf's Points & Authorities]

In Settlement of the Following Invoices	NATION WIDE HOUSING AND DEVELOPMENT CORPORATION 220 K Street, N. W. Washington 1, D. C. NO. 561
Date Amount	August 26, 1963 15-55/511
301 K St., N.W.	PAY TO THE ORDER OF American Ice Co. $350.00
	Three hundred Fifty ---------- DOLLARS
	Nation Wide Housing and Development Corporation
	/s/ Cecile Marie Miller Auth. Sig.
	AMERICAN SECURITY & TRUST CO. WASHINGTON, D. C.

[Filed March 18, 1964]

EXHIBIT 3
[Attached to Plf's Points & Authorities]

VIA
REGISTERED MAIL
RETURN RECEIPT

September 12, 1963

Har-Rich Realty Corporation
200 K Street, N. W.
Washington, D. C.

Re: Premises: 301 K Street, N. W.
Washington, D. C.

Gentlemen:

Inasmuch as you are once again in default under the Deed of Trust Note, dated November 25, 1958, in the original sum of $35,000, which we hold secured by a Deed of Trust bearing even date covering the above property in that you have failed to make the monthly payment of $350.00 which became due on August 25, 1963, you are hereby notified that we elect to declare the entire unpaid principal balance of $22,181.18 together with interest thereon at the rate of 5% per annum from July 25, 1963 to be due and payable.

Accordingly, we hereby demand immediate payment in full of such sum and interest. We will not accept payment of the installment in arrears.

Very truly yours,

Earle D. Barton
Secretary

EDB

cc: Messrs. Joseph S. Robinson
Justin L. Edgerton
Richard P. Rubenoff

[Filed March 18, 1964]

EXHIBIT 4

[Attached to Plf's Points & Authorities]

NATIONWIDE HOUSING & DEVELOPMENT CORP.
220 K Street, N. W.
Washington 2, D. C.

101

July 25, 1963 — 15-120/511

PAY TO THE ORDER OF American Ice Company — $1750.00/

Seventeen-hundred Fifty and 00/100 — DOLLARS

DISTRICT OF COLUMBIA
NATIONAL BANK
Washington 6, D. C.

/s/ Cecile Marie Miller

301 - K St. N.W.

Pay to the Order of
Chemical Bank New York Trust
Company
AUG 5 1963
American Ice Company
Knickerbocker Ice Company
American Consumer Industries, Inc.

[Check Endorsed by Chemical Bank of New York Trust Company, New York
AUG 5 63 70045 [413] 1-12]

[Check Endorsed by The Riggs National Bank of Washington, D. C. 15-3/511
AUG 7 63 0027]

[Filed March 18, 1964]

EXHIBIT 5
[Attached to Plf's Points & Authorities]

AFFIDAVIT OF ETHAN ALLEN TURSHEN

ETHAN ALLEN TURSHEN, being duly sworn, on oath deposes and says:

That on or about November 15, 1963, at the request of Orie Seltzer, attorney at law, of Washington, D. C., who was at that time hospitalized and indisposed, he called the offices of Pledger & Edgerton, attorneys at law, Washington, D. C. regarding payments due to the American Ice Company. During this telephone conversation, he was instructed to forward the payments due to the offices of Pledger & Edgerton and that he did so on or about that date, as per copy of letter appended hereto as Appendix A-1, and with said letter he attached a Cashier's Check from the Public National Bank, No. 1184, a copy of which is appended hereto as Appendix A-2. During the aforesaid telephone conversation, no reference was made to any foreclosure or to any taxes which might have been in arrears.

/s/ Ethan Allen Turshen

[JURAT the 16th day of March, 1964]

- - - - - - - - -

APPENDIX A-1 to EXHIBIT 5

PUBLIC NATIONAL BANK
Washington, D. C.

15-12
511

November 15, 1963 No. 1184

PAY
TO THE
ORDER OF American Ice Company $700.00

Re: Two months' rent
Har-Rich Realty Corp.

Public
National
Bank

$700 and 00 cts

/s/ Frank A. Baker
Cashier

CASHIER'S CHECK

APPENDIX A-2 to EXHIBIT 5

November 15, 1963

Justin L. Edgerton, Esq.
Washington Building
Washington 5, D. C.

In Re: Har-Rich Realty Corp.

Dear Mr. Edgerton:

Enclosed please find cashier's check No. 1184, payable to the order of The American Ice Company in the amount of $700.00, and dated today for two months' rent for the Har-Rich Corp. Mr. Seltzer will speak to you next week concerning the matter of commitments which you mentioned today.

Please accept our apologies and our personal appreciation to you for your kindness in these circumstances.

Very truly yours,

Ethan Allen Turshen

EAT:bcs

Enclosure

[Filed March 18, 1964]

EXHIBIT 6
[Attached to Plf's Points & Authorities]

Law Offices of
PLEDGER & EDGERTON
925 Washington Building
Washington 5, D. C.

December 18, 1963

Orrie Seltzer, Esquire
1415 K Street, N. W.
Washington 5, D. C.

Re: Har-Rich Realty Corporation

Dear Mr. Seltzer:

In accordance with the instructions of my client, as explained in my letter to you of December 4, 1963, I am returning the following checks which were re-tendered as payment of the arrear installments due on the note dated November 25, 1958:

Check No. 561 for $350.00, dated 8/26/63;
Cashier's check No. 1184, for $700.00, dated 11/15/63; and
Check No. 1,000 for $350.00, dated 11/23/63.

As I have heretofore advised you, my client will not accept payment of any installments due on or after July 25, 1963, and will accept payment, under the acceleration clause provided in said note, only of the full balance of principal due with interest thereon from July 25, 1963, and all costs and expenses which have been incurred pursuant to the foreclosure proceedings which have now been initiated.

In addition to the chronic delinquency in payment of this note over a long period, and in view of the serious prejudice to the noteholder, which has resulted from the non-payment of all District of Columbia real estate taxes due for the years 1962, 1963 and the first half of 1964, timely payment of which is required by the provisions of the deed of trust securing the said note, the surviving trustee, under express instructions from the holder of the note, has no alternative except to proceed with foreclosure.

Very truly yours,

/s/ Justin L. Edgerton

JLE:vtp
Encs.

[Rec'd Dec 18 1963 Law Offices
Orie Seltzer]

[Filed March 18, 1964]

EXHIBIT 7
[Attached to Plf's Points & Authorities]

Law Offices of
PLEDGER & EDGERTON
925 Washington Building
Washington 5, D. C.

* * * * * *

May 17, 1962

Frederic Richmond, Esq.
220 K Street, N. W.
Washington, D. C.

Dear Mr. Richmond:

I received your letter of May 8, 1962 in which you stated that you had advised your client, Har-Rich Realty Corporation, to reject our request for payment of $250.00 for costs and expenses to this office for legal services made necessary by the default in payment of the note of the corporation secured by first deed of trust on Lot 1, Square 526, premises 301 K Street, N. W.

May I remind you that the trustees under this deed of trust are Charles E. Pledger, Jr. of this office and Randolph C. Richardson who has resigned as such trustee because of his appointment as a Judge of the Municipal Court. Mr. Pledger, the surviving trustee, was advised by the holder of the note of the default in payment and took necessary steps to either satisfy the default or proceed with foreclosure proceedings on the property. The legal expenses incurred by reason of the services of this office in connection with the default was a cost and expense necessarily incurred by the surviving trustee in strict conformity with the provisions of the deed of trust, in pertinent part provides as follows:

> "AND WHEREAS, the party of the first part desires to secure the prompt payment of said debts, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said parties of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and all money which may be advanced as provided herein, with interest on all such costs and advances from the date hereof.
>
> * * * * * * *
>
> "AND UPON THIS FURTHER TRUST, upon any default
> * * * *

[Filed March 20, 1964]

AFFIDAVIT OF EARLE D. BARTON

EARLE D. BARTON, being first duly sworn on oath deposes and says: that he is the Secretary of American Consumer Industries, Inc., a corporation, one of the defendants herein, formerly operating under the name of "American Ice Company", hereinafter referred to as "American"; that he makes this affidavit on personal knowledge; that on November 25, 1958, American conveyed to Har-Rich Realty Corporation, hereinafter referred to as "Har-Rich", the plaintiff herein, Lot 1, Square 526, improved by the premises known as 301 K Street, N. W., in the District of Columbia; that in partial payment for the said conveyance Har-Rich executed a promissory note in the face amount of $35,000.00, with interest at the rate of 5% per annum repayable in monthly installments of $350.00 on the 25th day of each month with the entire balance of principal and interest to be due and payable in full December 15, 1965, a copy of the said note being attached to the affidavit of Justin L. Edgerton, previously filed herein; that the said promissory note was secured by a deed of trust naming Charles E. Pledger, Jr. and the late Randolph C. Richardson as Trustees, a copy of the said deed of trust being attached to the affidavit of Justin L. Edgerton previously filed herein; that, down to the date of filing the complaint in this action, American was never notified by or on behalf of Har-Rich that there was any objection to the naming of the said trustees nor did Har-Rich suggest that other persons should be named as trustees or substituted for the said Pledger and Richardson; that from and after the execution of the said note Har-Rich was frequently delinquent in its monthly payments and in payment of real estate taxes to the District of Columbia, as set forth with more particularity in the affidavit of Justin L. Edgerton filed herewith; that the entries of payments on the said note were sometimes made as of the date when the said monthly payments were due rather than the dates of actual receipt of the payments and therefore the dates in the "Date of Payment" column on the said promissory note do not, in all cases, reflect the dates

of receipt of the payments; that because of Har-Rich's numerous defaults and delinquencies in repayment of the installments due on the said promissory note, American has been forced to expend a substantial amount of time and money in writing numerous letters demanding payment and has, in addition, paid in excess of $1000.00 to its attorneys for services rendered in connection with the collection of the installments due on the said note; that American did not receive timely payment of the monthly installment due on August 25, 1963, and that, no tender of the August payment having been received and because of the numerous previous delinquencies in payment of the installments and of the District of Columbia real estate taxes as aforesaid, the affiant, on behalf of American, wrote to Har-Rich on September 12, 1963, declaring that the entire unpaid principal balance of $22,181.18 together with interest thereon at the rate of 5% per annum from July 25, 1963, was due and payable, in accordance with the acceleration clause in the aforesaid promissory note; that on September 20, 1963, American received, in an envelope postmarked September 18, 1963, check number 561, dated August 26, 1963, drawn by Nationwide Housing and Development Corporation on the American Security and Trust Company to the order of American Ice Company in the amount of $350.00; that on the same day, September 20, 1963, affiant wrote to Har-Rich by registered mail returning the said check, refusing to accept it as payment for the August 25, 1963, installment and renewing its demand for the entire unpaid principal together with the accrued interest thereon, a copy of the said registered letter being attached hereto as Exhibit "11"; that on September 24, 1963, the said registered letter was returned to American with the notation "moved, left no address", a photocopy of the said envelope and the notation thereon being attached hereto as Exhibit "12"; that by reason of Har-Rich's failure to pay the entire balance due on the said note and its failure to pay the District of Columbia real estate taxes for the years 1962, 1963 and the first half of 1964, American instructed the trustees to sell the said property at foreclosure; that Har-Rich was fully informed of the pendency of the said foreclosure sale but stood by and permitted the rights of

the purchaser at the said sale to intervene and did not seek to enjoin the sale or offer to file a bond to protect the rights of the parties while such foreclosure sale was delayed.

/s/ Earle D. Barton

[JURAT the 13th day of March, 1964.]

[Filed March 20, 1964]

EXHIBIT "11"
[Attached to Barton's Affidavit]

AMERICAN CONSUMER INDUSTRIES, INC.

* * *
Executive Office
375 Park Avenue
New York 22, New York

REGISTERED MAIL
RETURN RECEIPT

September 20, 1963

Har-Rich Realty Corporation
220 K Street N. W.
Washington, D. C.

Re: Premises - 301 K Street, N. W.
Washington, D. C.

Gentlemen:

We return herewith check #561, dated August 26, 1963, drawn by Nation Wide Housing and Development Corporation on the American Security & Trust Co. to the order of American Ice Company, in the amount of $350.00, which check was received today in an envelope postmarked September 18, 1963.

On September 12, 1963 we advised you by registered mail that inasmuch as you had defaulted in making the payment due under the Deed of Trust Note, dated November 25, 1958, in the original amount of $35,000, which we hold secured by a Deed of Trust bearing even date covering the above property, we had elected to declare the entire unpaid principal balance of $22,181.18, together with interest thereon at the rate of 5% per annum from July 25, 1963 to be due and payable; and we advised you that we would not accept payment of the installment in arrears.

Very truly yours,

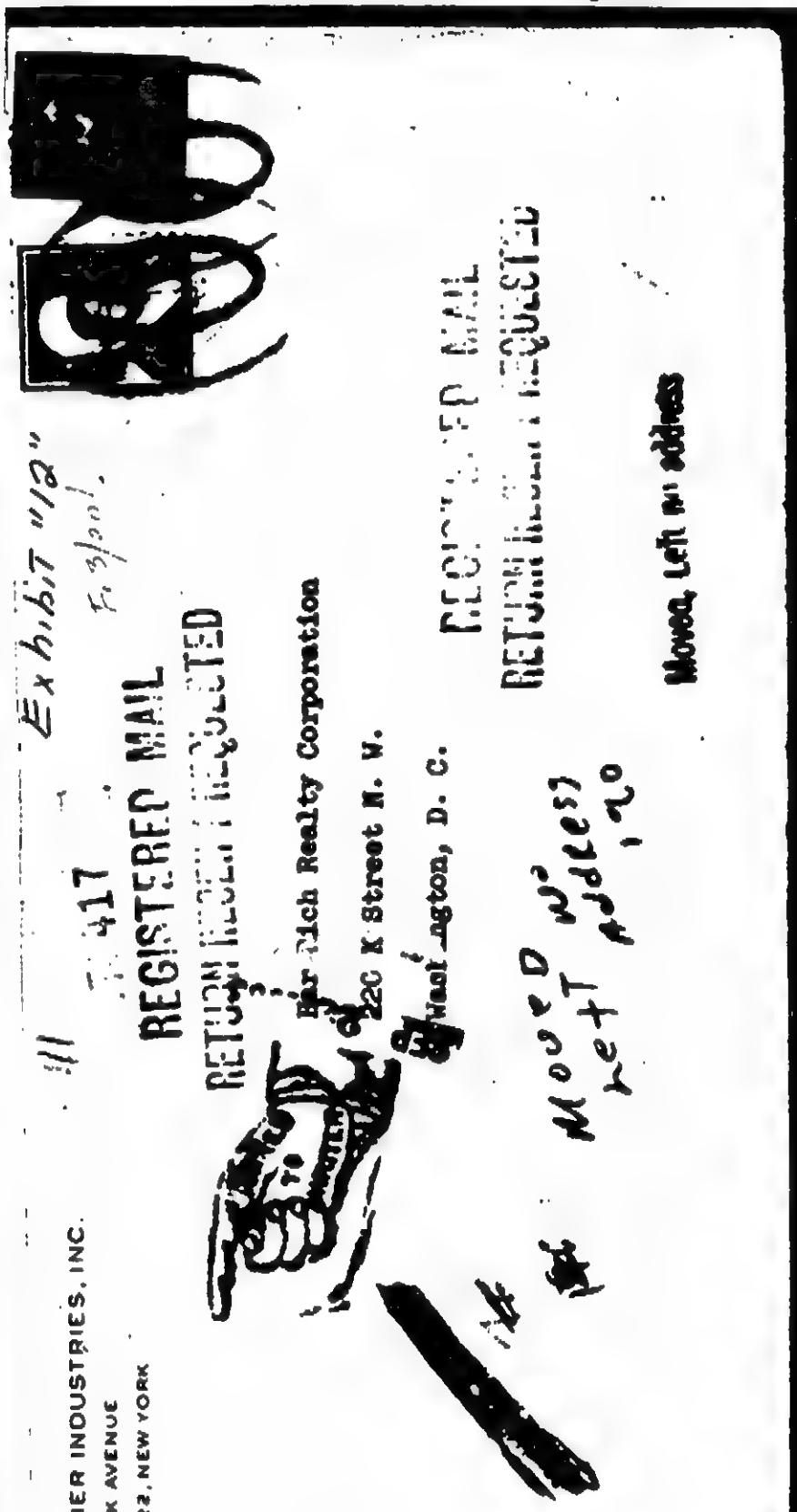
/s/ Earle D. Barton
Secretary

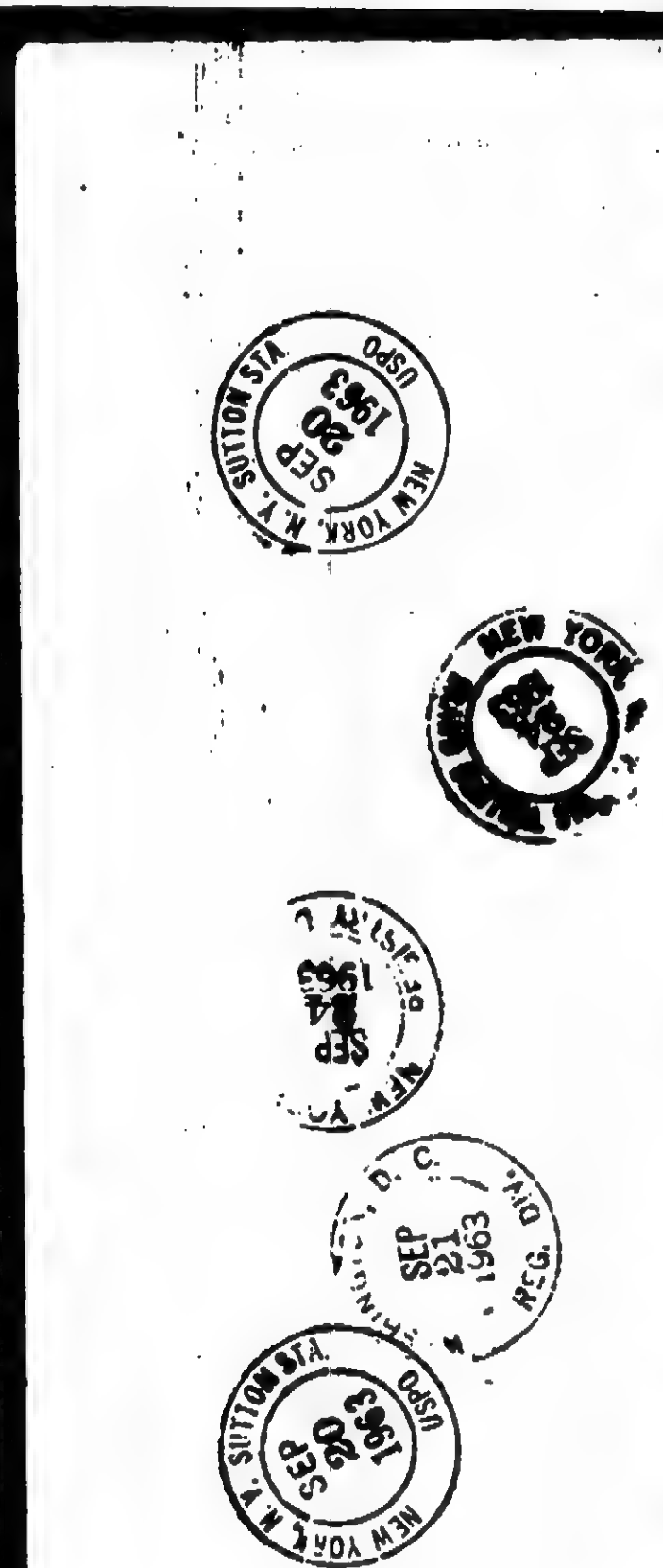
EDB:lm
encl.

[Filed March 20, 1964]

EXHIBIT "12"

[Attached to Barton's Affidavit]





[Filed March 20, 1964]

AFFIDAVIT OF THOMAS J. OWEN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THOMAS J. OWEN on oath duly sworn deposes and says: that he is the Treasurer of Thomas J. Owen & Son, Inc., Auctioneers, 1111 E Street, N. W., Washington, D. C. (hereinafter called "the Corporation"); that he is an auctioneer for the said corporation; that he makes this affidavit on personal knowledge; that on December 20, 1963, at approximately 1:45 P.M. the affiant presided as auctioneer at the sale of original Lot 1, in Square 526, a parcel of ground containing approximately 5,280 square feet situated on the northwest corner of Third and K Streets, N. W., Washington, D. C.; that the said sale was held at the direction of Charles E. Pledger, Jr., remaining Trustee under a deed of trust on the said property; that the said sale was advertised in the Evening Star Newspaper on December 10, 12, 14, 17 and 19, 1963, a copy of the said advertisement being attached hereto and made a part hereof by reference; that the weather was clear and no precipitation was falling on the day of the said sale; that the said sale was attended by approximately 21 persons, including Kurt Berlin, Esq., who stated that he was an attorney representing Har-Rich Realty Corporation; that the said Kurt Berlin stated that Har-Rich Realty Corporation objected to the said sale but did not offer to post a bond or take any other steps to protect the interests of the Trustee, the noteholder, or any other persons interested in the said property; that bidding was opened and that at least five persons there present made bids on the said property and that the property was knocked down to the highest bidder, Nathan Habib, for a price of $35,000.00 all cash; that the said Nathan Habib made a deposit of $2,500.00 in accordance with the terms of the sale; that, although the terms of sale provided for settlement within 30 days there has been no such settlement because of the filing of this action by the plaintiff and that the corporation still holds the aforesaid deposit of $2,500.00 less its commission and expenses incurred in connection with the said sale; and that the said purchaser, Nathan Habib,

has stated to the affiant that he desires settlement to go forward as soon as possible in order that title to the aforesaid property might vest without further delay.

/s/ Thomas J. Owen

[JURAT the 18th day of March, 1964.]
[Certificate of Service]

[Filed March 20, 1964]

EXHIBIT TO AFFIDAVIT OF THOMAS J. OWEN

THOS. J. OWEN & SON, INC.
Auctioneers, 1111 E St. N.W.

TRUSTEES' SALE OF VALUABLE UNIMPROVED GROUND LOCATED ON THE NORTHWEST CORNER OF 3RD AND K STREET, NORTHWEST, FORMERLY KNOWN AS 301 K STREET, NORTHWEST AND CONTAINING 5,280 SQUARE FEET OF GROUND, ZONED C-3-B.

By virtue of a certain deed of trust duly recorded, in Liber No. 11151, Folio 470, et seq., of the land records of the District of Columbia, and at the request of the party secured thereby, the undersigned trustee will sell, at public auction, in front of the premises, on FRIDAY THE TWENTIETH DAY OF DECEMBER, A.D. 1963, AT 1:45 O'CLOCK P.M., the following-described land and premises, situate in the District of Columbia, and designated as and being Original Lot 1 in Square 526.

TERMS OF SALE: ALL CASH. A deposit of $2,500 in cash or certified check will be required at time of sale. Adjustments made as of date of sale. All conveyancing, recording, recordation tax, revenue stamps, etc., at cost of purchaser. Terms of sale to be complied with within thirty days from day of sale, otherwise the trustee reserves the right to resell the property at the risk and cost of defaulting purchaser, after five days' advertisement of such resale in some newspaper published in Washington, D. C.

CHARLES E. PLEDGER, Jr.,
de10, 12, 14, 17, 19, Surviving Trustee.

[Filed March 30, 1964]

SUPPLEMENTAL AFFIDAVIT OF EARLE D. BARTON IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EARLE D. BARTON, being first duly sworn on oath deposes and says: that he is the Secretary of American Consumer Industries, Inc., a corporation, one of the defendants herein, formerly operating under the name of "American Ice Company", hereinafter referred to as "American"; that he executed an affidavit filed herein on March 20, 1964, and that he incorporates by reference in this affidavit all of the statements in the said affidavit, previously filed; that he makes this affidavit on personal knowledge; that on September 20, 1963, American received check number 561 dated August 26, 1963, drawn by Nation Wide Housing and Development Corporation on the American Security and Trust Company to the order of the American Ice Company in the amount of $350.00; that the said check was received in an envelope postmarked September 18, 1963, a photocopy of the said envelope being attached hereto as Exhibit "13" and made a part hereof by reference; that prior to September 20, 1963, American did not receive any payment or tender of the payment due on August 25, 1963, from Har-Rich Realty Corporation on the promissory note filed herein as Exhibit "1" to the affidavit of Justin L. Edgerton.

/s/ Earle D. Barton

[JURAT the 24th day of March, 1964.]

[Certificate of Service]

[Filed March 30, 1964]

EXHIBIT "13"
[Attached to Barton's Supplemental Affidavit]

Washington Mortgage and
Investment Corporation
220 K Street, Northwest
Washington 1, D. C.

[Cancelled Stamps]

[Postmarked
September 18, 1963
Washington, D. C.]

American Ice Company
43 - Dryer St.
Long Island New York, N. Y.

[Filed April 14, 1964]

SUPPLEMENTAL OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, by his attorney, and in opposition to the Statement of Undisputed Facts submitted by the Defendants pursuant to Local Rule 9(h) submits the attached Exception to the Statement of Undisputed Facts, with attached exhibits, and Statement of Genuine Issues.

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

[Certificate of Service]

[Filed April 14, 1964]

EXCEPTION TO THE STATEMENT OF UNDISPUTED FACTS SUBMITTED BY DEFENDANTS PURSUANT TO LOCAL RULE 9(h)

Comes now the Plaintiff, by his attorney, and takes exception to the Statement of Undisputed Facts submitted by the Defendants, as more particularly set forth herein:

1. Paragraph One: The property is unimproved.

2. Paragraph Two: Admitted in its entirety.

3. Paragraph Three: The relationship of the Defendant Pledger and the late Randolph C. Richardson to the co-Defendant American Consumer Industries, Inc. (hereafter called American) was not known at the time of the execution of the Deed of Trust, see Affidavit of Frederic Richmond, Esq., appended hereto as Exhibit No. 1, who executed the said Deed of Trust on behalf of Plaintiff.

4. Paragraph Four: Admitted.

5. Paragraph Five: All of the delinquencies were brought current, in fact, Defendant American cashed a $1,750.00 check (constituting payments for 5 months' arrearages) from Plaintiff on August 5, 1963, which is 37 days before American tried to use the acceleration clause of the promissory note.

6. Paragraph Six: Plaintiff did make its August monthly payment, see Affidavit of Cecile M. Miller. Plaintiff did in fact tender all monthly payments and the law firm of Pledger & Edgerton, local counsel for Defendant American, directed Agent of Plaintiff to tender all payments to them. See Affidavit of Ethan Allen Turshen. This was over one month after the letter from American accelerating the debt. This acceptance, like previous acceptances in the past, cured the default, if any. This tender was not returned to Plaintiff until December 5, 1964. See letter from Pledger & Edgerton appended hereto as Exhibit No. 2.

7. Paragraph Seven: American's security interest was not endangered by the failure to pay the real estate taxes on time.

8. Paragraph Eight: The foreclosure sale was not proper for the following reasons:

(a) The cash deposit required as advertised, namely the sum of $2,500.00, was excessive, as customarily $1,000.00 is required in cases of property which brought, as this one did, only $35,000.00. This excessive cash deposit tended to depress the bidding.

(b) Notwithstanding the terms of the sale as advertised, the trustee and auctioneer permitted one George Lochte, who identified himself as a Vice President of Waggaman-Brawner Company, to bid even though he announced to the trustee and the auctioneer that he was not in possession of the required $2,500.00 deposit in cash or certified check.

(c) And the reasons set forth in the Points and Authorities previously filed herein.

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

[Filed Apr.14, 1964]

EXHIBIT NO. 1

[Attached to Exception to the Statement of Undisputed Facts]

AFFIDAVIT OF FREDERIC RICHMOND

FREDERIC RICHMOND, being duly sworn on oath deposes and says:

That during 1958 he was Vice-President of HAR-RICH REALTY COMPANY, and in that capacity he executed on November 25, 1958 the deed of trust and promissory note to Charles E. Pledger, Jr. and Randolph C. Richardson Trustees, which is the subject of this cause of action.

That to the best of his knowledge and belief, he was at the time of the execution of the deed of trust and note unaware of the fact that the trustees represented the American Ice Company, the party secured thereby as attorneys.

/s/ Frederic Richmond

[JURAT the 13th day of March, 1964]

[Filed April 14, 1964]

EXHIBIT NO. 2

[Attached to Exception to the Statement of Undisputed Facts]

Law Offices of
PLEDGER & EDGERTON
925 Washington Building
Washington 5, D. C.

* * * * * *

December 4, 1963

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Orie Seltzer, Esquire
1415 K Street, N. W.
Washington 5, D. C.

Re: Har-Rich Realty Corporation

Dear Mr. Seltzer:

I acknowledge receipt of your letter of November 23, 1963, with which you tendered check of Har-Rich Realty Corporation, in the sum of $350.00, representing the payment on the first deed of trust note due November 25, 1963. I attempted to reach you by phone both yesterday and today prior to writing this letter to discuss the matter with you.

I submitted your letter to my client, but, inasmuch as there has been no definite commitment made for the refinancing of the loan on this property, my client has instructed me to proceed in accordance with its letter dated September 12, 1963, to Har-Rich Realty Corporation, in which, by reason of the very unsatisfactory record of past defaults, it exercised the election provided in the note and accelerated payment of the full amount of principal due thereon and demanded payment thereof in the amount of $22,181.18. A copy of this letter is enclosed. This is the letter referred to in the letter from our client, addressed to you under date of October 8. Having declared the balance of the principal due on this note, and in accordance with its prior notice both to you and to Har-Rich, my client will not accept payment of any of the monthly installments due thereafter, and has instructed me to return to you and you will find enclosed:

1. Check No. 561 of Nation Wide Housing and Development Corporation, dated August 26, 1963, payable to the order of American Ice Company, in the sum of $350.00;

2. Cashier's Check No. 1184, to the order of American Ice Company, dated November 15, 1963, in the sum of $700.00, and

3. Check No. 1,000 of Har-Rich Realty Corporation, dated November 23, 1963, payable to American Ice Company, in the sum of $350.00.

Pursuant to my further instructions, I am proceeding with foreclosure on this property. The first advertisement will appear in the Washington Evening Star on December 10 and the sale will be held on December 20. If you wish to arrange to pay this note off in full and avoid incurring any expenses in connection with the foreclosure proceedings, payment therefor must be in my hands on or before December 9 in the amount of $22,181.18, with interest thereon at the rate of 5% per annum from July 25, 1963.

Very truly yours,

/s/ Justin L. Edgerton

JLE:vtp
Encs.

[Rec'd- Dec. 5, 1963
Law Offices Orie Seltzer]

[Filed April 14, 1964]

STATEMENT OF GENUINE ISSUES

Pursuant to local Rule 9(h), the Plaintiff, in opposition to the Motion for Summary Judgment, submits the following statements:

1. Did a default in payment actually exist at the time that the Defendant instituted foreclosure action?

2. Was the foreclosure sale proper in view of the following:

(a) The resignation of the late Randolph C. Richardson as Trustee which broke the unity of the joint tenancy between the Defendant Pledger and the late Randolph C. Richardson, which in the absence of language in the Deed of Trust required the substitution of the resigned trustee in order to exercise the power of sale.

(b) The exercise of his power of trustee by the Defendant Pledger in the light of his admitted relationship as counsel to the party secured thereby, namely the co-defendant, without disclosing his relationship to the Plaintiff at the time of the creation of the Deed of Trust.

(c) The acceptance of the monthly payments by the law firm of Pledger and Edgerton, counsel for the Defendant, American Consumer Industries, Inc., of which the co-Defendant Pledger is a member.

/s/ Kurt Berlin
Attorney for Plaintiff

* * *

TRANSCRIPT OF HEARING ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

1

Washington, D. C.
Thursday, April 16, 1964

Before the Honorable WILLIAM B. JONES, United States District Judge, at 10:54 a.m. today, on motions to dismiss and for summary judgment.

Appearances: For plaintiff: Mr. KURT BERLIN
For defendants: Mr. AUSTIN P. FRUM

2 PROCEEDINGS

THE DEPUTY CLERK: Har-Rich Realty Corporation versus American Consumer Industries, Incorporated.

THE COURT: This is the motion to dismiss by the surviving trustee, Charles E. Pledger, and the defendants' motion for summary judgment. Was the motion to dismiss ever acted upon?

MR. FRUM: No, Your Honor. They were both set down for hearing today. There are motions to dismiss by both of the defendants, and then a motion for summary judgment also on behalf of both of the defendants.

THE COURT: I understand. All right, I will hear you.

MR. FRUM: If Your Honor please, I would like to address myself to the summary judgment motion first of all. This is a case involving a foreclosure of realty in the District of Columbia. The plaintiff, Har-Rich Realty Corporation, purchased this real estate back in 1958, and gave to the seller, who is the defendant, American Consumer Industries, a note secured by a deed of trust. The payment on this note was very poor. There were constant defaults. The property was advertised for foreclosure, and the defendant, American Consumer Industries, was put to the burden of going right up to foreclosure, at least once if not twice.

3 This is all set forth in the affidavits filed – and expended a considerable sum of money just trying to keep the plaintiff current in its obligations here.

Finally, in August of 1963, the defendant, not having received its August payment, declared a default.

THE COURT: I am familiar with the factual situation. I would like to hear from Mr. Berlin.

Mr. Berlin, I understand your position to be two-fold, first that after the American Ice Company, or whatever it is called, declared the default, your people came along with the monthly payments, and I believe sent three checks in, the $300 a month. Is that correct?

MR. BERLIN: $350 a month, yes, Your Honor.

THE COURT: They sent three checks in. And also that the default in the payment of real estate taxes is no basis for acceleration. That is one side of it.

The second side is that since Charles Pledger is counsel for the American Ice Company, he could not serve as trustee on the deed of trust and effectuate a legal foreclosure – is that correct?

MR. BERLIN: No, Your Honor. May I?

THE COURT: Yes.

MR. BERLIN: On the question of the relationship between the trustee and the parties secured, we say that the Sheridan case, which

4 is the culmination of a number of cases in the Court of Appeals, has said, "When there is a relationship between the trustee and the

party secured, this relationship must be disclosed to the borrower. This was not done here. We have an affidavit by the –

THE COURT: All right. Let us assume that was not done. What effect does that have, the fact that that was not done?

MR. BERLIN: It then shifts the burden onto the trustee, to prove that he has exercised his duty, in his fiduciary capacity, in a proper fiduciary manner, without favoring the party secured and without injuring the borrower.

THE COURT: What do you claim the fiduciary, the trustee in this case, did that was wrong?

MR. BERLIN: He did the following: He went to foreclosure when there was no default. We claim, and our affidavits show, that on August 25th when the payment was due we mailed the August payment.

THE COURT: It wasn't received until the 20th of September, and was mailed in an envelope postmarked September 18th.

MR. BERLIN: Your Honor, the envelope that is in there, if we have Mr. Barton on cross-examination, we are prepared to show – and, by the way, Mr. Barton is the secretary of this corporation, who sits in New York City – the payments were paid to a branch office at Staton Island or some other part of New York. He comes in here with an affidavit and says on his own personal knowledge and belief he knows when this was received.

THE COURT: What was the date of your check?

MR. BERLIN: August 25th or August 26th.

THE COURT: What was the date of the August payment?

MR. BERLIN: August 25th.

THE COURT: One day late, from the check itself?

MR. BERLIN: Yes, sir.

THE COURT: There was a default right then, wasn't there?

MR. BERLIN: If the Court will take the position we are in default for one day, then we obviously were.

THE COURT: I do take the position. That is exactly the agreement you entered into, that you would pay monthly on the 25th day of each month.

MR. BERLIN: Your Honor, in my opinion these instruments must be construed in a manner fair to both parties. And to be one day late is not the type of default which should cause an acceleration of the debt.

THE COURT: Let's you and I have an understanding. I construe it to be a default. Let us go from there.

6 MR. BERLIN: If Your Honor construes it a default, then we fall back on our second argument, namely, that apart and aside from the relationship of the trustee to the parties secured, Mr. Richardson, who was the co-trustee with Mr. Pledger, resigned at the time of his appointment to the bench of the Court of General Sessions. This is undisputed.

That under the Code of the District of Columbia every deed of trust creates a joint tenancy between the parties, the trustees.

That in the absence of language in the deed of trust permitting the resignation or the substitution of trustees, by its own terms, which this deed of trust did not have, such a resignation could only destroy the unity of the joint tenancy – which is basic real estate law – and then one must look to the statute in the District of Columbia dealing with substitution of trustees, resignation of trustees. And this was not done here. Mr. Richardson –

THE COURT: And the statute is permissive – "may appoint a successive trustee."

MR. BERLIN: Right. But the resignation of Mr. Richardson destroyed the unity of the type of interest which the trustees had in the property. And his subsequent unfortunate demise some years later does not cure that.

7 THE COURT: Of course, he was no longer trustee at the time of his death. He had resigned as trustee when he became a judge of the then Municipal Court.

MR. BERLIN: That is right.

THE COURT: So he wasn't a trustee from that day on.

MR. BERLIN: That is right. But that required, unless the deed of trust specifically permitted substitution, or permitted the remaining trustee to proceed by himself, it required the substitution by a court proceeding

of another trustee. Or, in the alternative, it required a court action saying the remaining trustee, not the –

THE COURT: Let us assume you are right. Let us assume that the actual sale of the deed, the trustees' deed, was defective because there wasn't a second trustee substituted. How could that help you at all? You have been in default and the default was declared by the note holder. They could just get another trustee and come in and foreclose again, couldn't they?

MR. BERLIN: There are two points where it helps us. One, we have one other argument, and that is that subsequent to the acceleration – and while I do not concede the acceleration was proper, though for the purpose of this argument I shall – subsequent to the acceleration, which took place by letter of September 12 by the secretary of the defendant, American Consumer Industries, there was a letter written to the plaintiff in which he said, "You deal with our Washington counsel, Edgerton and Pledger."

And subsequent thereto, we have affidavits in our possession showing that the authorized representative for the defendant, American Consumer Industries, their local counsel, accepted all the arrearages which were then in default, and by acceptance of these checks cured the default.

Now this is true, that in this particular deed of trust over the years there have been repeatedly defaults by my client. But all the times the defendant, American Consumer Industries, accepted these arrearages when they were due. And we say in this case on November 15th, when one of the gentlemen in their local counsel's office said "Send the checks in", that cured the default and the acceleration which they claim took place in September.

THE COURT: What are you going to do about that indispensable party, who happens to be the grantee of the trustees' deed? How are you going to explain him? You said he was out of town and for that reason you couldn't get jurisdiction of him.

MR. BERLIN: If the Court feels he was an indispensable party, we will gladly serve him. However, I have cited cases which are quite similar

with the factual situation here, where the courts have said he is not an
9 indispensable party, because the only thing that would –

THE COURT: You are asking me to set aside a trustees' deed, that conveys to –

MR. BERLIN: Not a deed, Your Honor. There has been no conveyance, only a sale.

THE COURT: There has been no conveyance?

MR. BERLIN: No, Your Honor.

MR. FRUM: That is correct.

THE COURT: No deed? No conveyance?

MR. BERLIN: No, Your Honor.

THE COURT: But this man was the purchaser at the sale?

MR. BERLIN: Yes, Your Honor.

THE COURT: So we are going to determine his rights without his even being here? Is that it?

MR. BERLIN: No, Your Honor, we don't determine his rights. We determine the rights between the plaintiff and the defendants. And, depending upon the outcome of those rights, the successful purchaser at the sale has a cause of action against the defendants here. Because if his sale was improper, he is entitled to the return of his deposit back, or he is entitled to damages if he can show damages by this. But the damages that we claim against the defendants do not affect him one way or the other.

10 When he buys at a sale, there is an announcement by the auctioneer, "I offer for sale, subject to good title, the following property, under these and these terms." The fact of the matter is that he couldn't give good title, because when we filed a suit, a lis pendens on the property was created, and the title company said good title couldn't be had.

So the recourse of the successful bidder at the auction is either to get his deposit back, or proceed after completion of this suit against either the American Ice Company or the trustees or against us.

THE COURT: Very well.

MR. FRUM: Your Honor, on the point about the so-called joint tenancy between the two trustees, I think, as Your Honor has alluded to

the Title 45, Section 614, it is permissive as far as substituting trustees. And this clearly indicates that –

THE COURT: What about this joint tenancy question? Mr. Berlin says there is a joint tenancy established, and therefore you have to have a substituted trustee.

MR. FRUM: I am not clear on his authority for the joint nature of this tenancy. However, I believe that even if that is true, that this statute clearly sets forth the procedure for substituting a trustee, and makes it

11 permissive, and makes it the right of either party. So that the plaintiff could perfectly well, if they were so concerned about having two trustees instead of one, they could have substituted.

And the records show, a letter submitted by the plaintiff itself shows – and this is a letter from the firm of Pledger and Edgerton, dated May 17th, 1962, which is attached –

THE COURT: Is that attached to the –

MR. FRUM: I believe it is attached to the –

THE COURT: I have it now, except mine has one page that doesn't carry out the whole thing. Do you have two pages?

MR. FRUM: No, I don't.

THE COURT: There is no second page of the letter.

MR. FRUM: Yes.

MR. BERLIN: Which one is this, Your Honor.

THE COURT: A letter from Pledger and Edgerton to Frederic Richmond, Esquire, May 1962.

Is that the one you are talking about, Mr. Frum?

MR. FRUM: That is right.

THE COURT: It goes down here to the last line where it says, "upon any default of," and then it disappears.

MR. BERLIN: Your Honor, that is the best copy I was able to get.

12 THE COURT: Do you have a second page of the letter?

MR. BERLIN: There was one. But Mr. Richmond, who at that time represented the plaintiff, does not have it. That is all he gave me.

THE COURT: All right.

I will hear you, Mr. Frum.

MR. FRUM: Anyway, the matter to which I am alluding does appear on the first page, and states that Randolph C. Richardson, who has resigned as such trustee because of his appointment as judge of the Municipal Court – and this is May 1962.

So that the plaintiff was on notice as early as that time that there was only one trustee, and yet took no steps to substitute a trustee, which it was the plaintiff's right to do under the code section I have just cited – Title 45, Section 614.

And, as Your Honor has noted, that is a permissive section. It does not make a substitution mandatory, in the absence of language in the deed of trust itself making the substitution mandatory. I don't believe it is here, and I believe that the surviving trustee has all the powers of the original two trustees. This is a principle of trust law generally, and it is specifically applicable here.

13 The plaintiff is arguing that the local counsel, Pledger and Edgerton, for the defendant American Consumer Industries, he uses the word "accepted" the checks. They did not accept them; as a matter of fact they returned them, all of them. It is true that they did consult with the client in New York before doing so. They didn't return them immediately. There was a lapse of time, although not very much time – a week or so, I believe – between the receipt of these checks and their return.

During this period of time the correspondence between the parties shows that the plaintiff was talking about refinancing the property, getting somebody else to pick up the deed of trust, and that this was presented by the plaintiff as a reason for delaying the foreclosure sale. And, as a matter of fact, there was about a three months' or more lapse of time in there between the declaration of default and the entire balance, and the foreclosure sale.

During this period of time the plaintiff suggested that it might be able to refinance the property, which would of course enable it to repay

the whole balance due, and there wouldn't be any need for foreclosure. However, this didn't come off, and so finally they had to foreclose.

This is the reason for Pledger and Edgerton's taking the checks and holding them for a few days, and not just returning them immediately in the return mail.

14 THE COURT: Where is this letter Mr. Berlin referred to about "Go see our local counsel"?

MR. FRUM: There is an affidavit of Mr. Turshen which alludes to an Appendix A-1. However, I don't find the appendix.

THE COURT: I have a November 15, 1963 letter, addressed to Mr. Edgerton, in which he says, "Enclosed find cashier's check No. 1184 payable to the order of American Ice in the Amount of $700.00," and so on. That is for rent they are talking about there, and no payments on the note.

MR. BERLIN: Your Honor, that is just an error in terminology. Mr. Turshen wasn't familiar with it.

THE COURT: It was an error when they didn't pay on the 25th of August, too.

MR. BERLIN: Yes, they were one day late.

MR. FRUM: In any event, none of these checks were cashed by the defendants, and therefore it is not correct to say they were accepted. They were not accepted; they were held.

THE COURT: This check, on the face of the letter, it shows it was accepted as rent. It doesn't show it had anything to do with payment on the note.

MR. FRUM: That is right.

15 THE COURT: I am looking at the affidavit here – (reading from affidavit).

But what I am getting at, Mr. Berlin, you direct my attention to this. You are the one who said this was your argument, that there was a letter from the American Ice Company to your client that they should take up these matters with Pledger and Edgerton.

MR. BERLIN: Yes, sir. Your Honor, that is a letter dated October 8, 1963.

THE COURT: And what is it attached to in this file of mine?

MR. BERLIN: If you will bear with me, Your Honor?

THE COURT: Yes.

MR. BERLIN: I don't believe it is attached to any of my affidavits.

THE COURT: Then it isn't before me on this motion for summary judgment.

MR. BERLIN: If I may, I would like to tender it, in view of the –

THE COURT: No, sir. You are arguing a motion for summary judgment here today.

Go ahead, Mr. Frum.

MR. FRUM: In any event, Your Honor, none of these checks were accepted, and therefore the default of the entire balance, which was something over $20,000 remaining due up to the time of the foreclosure sale.

16 The foreclosure sale was duly held. There is no affidavit or any other charge that there was anything improper about it, except that the plaintiff's attorney in his opposition makes an unsworn statement regarding his view that the cash deposit required was excessive. But this clearly is not before the Court.

THE COURT: The cash deposit?

MR. FRUM: Which the trustees required at the foreclosure sale. He makes this statement in his points and authorities, or rather in the exceptions to the statement of undisputed facts, which was filed two days ago. But that is a mere unsworn assertion of counsel as to some alleged impropriety in the terms of the sale.

The sale was perfectly proper. There is an affidavit of the auctioneer in the file which shows that the sale was quite regular. It was held on a day when the weather was good. It was duly advertised and there was very active bidding for the property. And the property was sold. The purchaser has a contract to purchase, though there has been no conveyance, because of the pendency of this law suit.

Therefore we submit that this case is in perfect posture for summary judgment, because of the undisputed facts.

17 I will not argue the motion to dismiss, unless Your Honor wishes me to at this time.

THE COURT: As I understand the facts we have here, they are undisputed and are as follows:

There was a purchase made by the plaintiff here from American Ice Company – or whatever the name –

MR. FRUM: Yes; they changed names.

THE COURT: – for some $35,000, with final payment to be January 1965, with monthly payments of $350 a month; an acceleration clause in the note;conveyance made to the plaintiff, with deed of trust back, Pledger and Richardson trustees, the note payable to American Ice.

That as of August 26, 1963 there was a default. The note holder declared the default.

That there is no evidence in here that the note holder or any other authorized person ever lifted the default.

That it went on to foreclosure sale; the sale was had; that because of the pendency of this case there cannot be good title conveyed to the purchaser.

Under those circumstances, I am granting summary judgment.

MR. BERLIN: May we take an exception to that, Your Honor?

THE COURT: You may do anything you want to.

18 MR. FRUM: Your Honor, I would like to point out one thing with respect to this default which will become relevant on an appeal, if there is one taken; and that is that the check was made out on the 26th of August. Your Honor has said that that in itself, even if tendered on that day, would constitute a default.

The undisputed facts here show that there is an affidavit by a woman –

THE COURT: I made reference to that earlier, that she said she had mailed it and it never came back. You have an affidavit in there showing it was received in an envelope dated September 18th and was received September 20.

MR. FRUM: Yes.

THE COURT: And you have a letter here showing it was returned.

MR. FRUM: Yes.

THE COURT: The main thing is there was a default on August 26th, and that was sufficient.

[Filed April 23, 1964]

ORDER

This matter having come on for hearing upon defendants' motion to dismiss the complaint and upon defendants' motion for summary judgment, and the Court having considered the motions and the oppositions thereto and having heard argument thereon, it is by the Court this 23rd day of April, 1964,

ORDERED, that the motion of defendants American Consumer Industries, Inc. and Charles E. Pledger, Jr. for summary judgment be and the same is hereby granted; and it is

FURTHER ORDERED, that defendants' motion to dismiss the complaint be and the same is hereby denied as being moot.

/s/ William B. Jones
United States District Judge

[Filed May 19, 1964]

NOTICE OF APPEAL

Notice is hereby given this 19th day of May, 1964, that HAR-RICH REALTY CORPORATION, the Plaintiff herein hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of April, 1964, in favor of AMERICAN

CONSUMER INDUSTRIES, INC. and CHARLES E. PLEDGER, JR., the Defendants herein, against said HAR-RICH REALTY CORPORATION.

/s/ Kurt Berlin
Attorney for Plaintiff
* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAR-RICH REALTY CORPORATION, Appellant, v. AMERICAN CONSUMER INDUSTRIES, INC., et al., Appellees.	)	No. 18,678

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

1. That the trial Court erred in granting the Motion for Summary Judgment.

/s/ Kurt Berlin
Attorney for Appellant
* * *

[Certificate of Service]

SUPPLEMENTAL STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

1. That the Trial Court erred in not setting aside the foreclosure sale, since the remaining trustee could not exercise the power of sale after his co-trustee had resigned.

2. That the Trial Court erred in holding that there can be an acceleration of an installment Deed of Trust Note on one day's default.

3. That the Trial Court erred in granting the Motion for Summary Judgment in light of the admitted relationship of attorney/client between the noteholder and trustee which was not disclosed to the borrower.

4. That the Trial Court erred in not requiring testimony on the question of whether the fiduciary has been faithful to his trust when the pleadings disclosed a potential conflict of interest.

/s/ Kurt Berlin
Attorney for Appellant

* * *

[Certificate of Service]

APPELLANT'S DESIGNATION OF CONTENTS OF JOINT APPENDIX

1. Complaint.

2. Defendants' Motion for Summary Judgment and all appended exhibits.

3. Plaintiff's Opposition to Motion for Summary Judgment and exhibits.

4. Defendants' Statement of Undisputed Facts Pursuant to Local Rule 9(h).

5. Plaintiff's Supplemental Opposition to Motion for Summary Judgment and Exception to Statement of Undisputed Facts Submitted by Defendants.

6. Transcript of Hearing on Motions.

7. Order of Trial Court.

8. The Notice of Appeal.

9. The Statement of Points Upon Which the Appellant Intends to Rely.

10. This Designation of Record.

/s/ Kurt Berlin
Attorney for Appellant

* * *

[Certificate of Service]

WILBUR K. MILLER

3/29/65
MFD
10 30 am

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,678

HAR-RICH REALTY CORPORATION,

Appellant,

v.

AMERICAN CONSUMER INDUSTRIES, INC., et al.,

Appellees.

Appeal from the United States District Court for the District of Columbia

THOMAS S. JACKSON,
ROBERT M. GRAY,
JOHN L. LASKEY,
AUSTIN P. FRUM

1025 Connecticut Avenue, N. W.
Washington, D. C.

Attorneys for Appellees

JACKSON, GRAY & LASKEY
Of Counsel

QUESTIONS PRESENTED

In the opinion of the appellees, the following questions are presented by this appeal:

1. Where one of two trustees named in a deed of trust has died, does his prior resignation render a sale by the surviving trustee invalid?

2. Where the maker of a promissory note has been consistently and chronically delinquent in making installment payments thereon, and where, at a time when the maker was in default, the holder exercised the acceleration provisions of the note, may the holder be compelled to accept an installment payment and waive its right to demand payment of the full balance due?

3. Should a foreclosure sale under a deed of trust be set aside merely because the trustee is an attorney for the noteholder where this fact was known by the debtor long before the foreclosure sale and where no impropriety in the execution of the trust or damage to the debtor has been alleged?

4. Should a foreclosure sale under a deed of trust be set aside where the debtor who seeks such relief took no steps to enjoin such sale, notwithstanding that the debtor was informed of the pendency of the sale, and attended the sale?

5. May a suit to set aside a sale of real property be maintained without joining as a party the purchaser of the property in question?

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,678

HAR-RICH REALTY CORPORATION,

Appellant,

v.

AMERICAN CONSUMER INDUSTRIES, INC., et al.,

Appellees.

Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On November 25, 1958, the appellant purchased from appellee American Consumer Industries, Inc. (then doing business as American Ice Company and hereinafter referred to as "American") a parcel of real property in the District of Columbia described as Lot 1 in Square 526. In part payment therefor appellant executed a promissory note in the sum of $35,000.00 (J.A. 13-14), secured by a deed of trust on the above described realty naming American as the secured party and appellee Charles E. Pledger, Jr. and the late Randolph C. Richardson as trustees. (J.A. 15-19) The promissory note provided for interest at the rate of five percent (5%) per annum, principal and inter-

est repayable in monthly installments of $350.00 on the 25th day of each month, the entire balance of principal and interest to be due on December 15, 1964. The note further provided that upon default in any one of the installments the holder of the note could declare the entire principal sum together with accrued interest thereon due and payable at once.

Appellant's record of payment on this note was extremely poor. In particular, notwithstanding strong complaints by American (J.A. 10-12, 20-22) appellant was grossly late in making the monthly payments due in July, October and December, 1961, January, February, May and June, 1962. Moreover, appellant failed to pay the District of Columbia real estate taxes due in September, 1961 and March 1962, (J.A. 10-12, 23-24) which was a default under the deed of trust (J.A. 18). American, with its own funds, redeemed the property from sale for delinquent taxes and requested reimbursement for this expenditure from the appellant (J.A. 11, 24).

Randolph C. Richardson resigned as a trustee upon his appointment as a judge of the Municipal Court (now the Court of General Sessions) of the District of Columbia. A letter from the firm of Pledger and Edgerton, made a part of the record by appellant (J.A. 37), shows that appellant was aware at least as early as May 17, 1962, that Judge Richardson had resigned and that appellee Pledger was the remaining trustee. Moreover, this letter shows that appellant knew that Pledger was a member of the law firm which acted as attorneys for American. There is no showing that appellant objected to Pledger serving as the remaining trustee prior to the filing of the instant suit. Judge Richardson died prior to the foreclosure sale (J.A. 53).

Because of appellant's failure to reimburse American for the real estate taxes and its delinquency in payment of the July and August, 1962, installments on the note, American instructed Charles E. Pledger, Jr., the remaining trustee, to foreclose in accordance with

the provisions of the deed of trust. The sale was duly advertised and set for September 6, 1962, but prior to that time appellant tendered payments of the monies due and therefore the foreclosure sale was cancelled (J.A. 11). Within five (5) months appellant was in default again. It failed to make timely payment of the installments due for the months of March, April, May and June, 1963, and it was only after repeated demands and the taking of steps to bring about a foreclosure sale that these delinquent installments were paid (J.A. 12).

Appellant again failed to make timely payment of the installment due on August 25, 1963, and because of the record of chronic delinquency in payment of the note, American exercised its option under the provisions of the note to declare the full balance and accrued interest due and payable immediately (J.A. 12, 39). American advised the appellant of the exercise of this option by letter dated September 12, 1963 (J.A. 32, 39). On September 20, 1963, American received, in an envelope postmarked September 18, 1963, a check dated August 26, 1963, drawn by Nationwide Housing and Development Corporation in the sum of $350.00 (J.A. 31, 39, 45). That same day, this check was returned to appellant by registered mail with a letter explaining that the check could not be accepted because American had exercised its option to declare the entire unpaid principal balance together with accrued interest due and payable immediately. On September 24, 1963, this registered letter was returned to American with a notation that the addressee had "moved, left no address." (J.A. 39-41).

On November 15, 1963, more than two months after American had notified appellant of its exercise of the acceleration option and stated that it would not accept installment payments, appellant tendered to American's attorneys a cashier's check for $700.00 as "rent." (J.A. 34-35). This check was not cashed and was returned along with two other checks to appellant on December 4, 1963, with a letter stating American's intent to go forward with the foreclosure sale. (J.A. 48-

49). Appellant again attempted to tender these three checks and they were again returned uncashed on December 18, 1963 (J.A. 36). American never accepted any attempted installment payments and appellant never tendered payment of the full balance plus interest as required by the acceleration clause.

Because of appellant's failure to make such payment, and its failure to pay real estate taxes as required by the deed of trust, American instructed Pledger to foreclose as was his duty under the terms of the deed of trust (J.A. 12, 17). At no time did appellant, which was always advised by an attorney, ever demand any forbearance of Pledger, or put him on notice not to foreclose.

The sale was duly advertised and held on December 20, 1963. The weather was clear and the sale was attended by approximately twenty-one persons, including counsel for appellant, who "stated his objection to the sale but did not offer to post a bond or take any other steps to protect the interests of the trustee, the noteholder or any other persons interested in the property." (J.A. 42). Neither did appellant institute any legal proceedings to enjoin the foreclosure sale although it was kept fully advised of the pendency of the sale (J.A. 39-40). Bidding was opened and at least five persons made bids on the property which was knocked down to the highest bidder, one Nathan Habib, at $35,000.00 all cash (J.A. 42). There is nothing in the record to support any allegation that the sale was in any way unfair or improper and appellant does not even now assert that the price was inadequate or that it was damaged by the manner in which the sale was held.

Subsequent to the foreclosure sale and prior to the settlement thereon, the appellant filed this action (J.A. 1-3). Appellees moved to dismiss upon the ground, among others, that the appellant had fail- to join an indispensable party, i.e., Nathan Habib, the purchaser at the foreclosure sale (J.A. 3-4). Defendant also moved for summary

judgment with supporting affidavits and exhibits. (J.A. 4-28, 38-45). The undisputed facts upon which appellees' motion was based were not seriously controverted by appellant. An affidavit of Cecile M. Miller, assistant secretary of appellant, stated that she prepared a check dated August 26, 1963, in the sum of $350.00 and that she mailed this check to American "shortly thereafter." (J.A. 30-31). This vague statement does not controvert the affidavit of Earle D. Barton that the check was received on September 20, 1963, in an envelope postmarked September 18, 1963. Thus, the uncontroverted evidence shows that the check in purported payment of the installment due on August 25, 1963, was not mailed until September 18, 1963, eight days after American had notified appellant of its exercise of the acceleration provisions of the promissory note (J.A. 32).

Based upon these uncontroverted facts, the trial judge granted appellees' motion for summary judgment (J.A. 61), and this appeal is brought from that judgment.

STATUTES AND RULES INVOLVED
District of Columbia Code
(1961 Edition)

§ 13-336.

(a) In actions specified by subsection (b) of this section, publication may be substituted for personal service of process upon a defendant who can not be found and who is shown by affidavit to be a non-resident, or to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons.

(b) This section applies only to:

(1) actions for partition;
(2) actions for divorce or annulment;
(3) actions by attachment;
(4) actions for foreclosure of mortgages and deeds of trust;

(5) actions for the establishment of title to real estate by possession;
(6) actions for the enforcement of mechanics' liens, and other liens against real or personal property within the District; and
(7) actions that have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court.

§ 28-103.

The sum payable is a sum certain within the meaning hereof, although it is to be paid -

First. With interest; or

Second. By stated installments; or,

Third. By stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; or

Fourth. With exchange, whether at a fixed rate or at the current rate; or,

Fifth. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Federal Rules of Civil Procedure

Rule 19.

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of

the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

SUMMARY OF ARGUMENT

Judge Richardson's resignation and his later death did not render appellee Pledger, the remaining trustee, powerless to carry out the terms of the deed of trust, particularly where appellant knew of the resignation and did not seek to substitute a trustee in his place.

American's exercise of the acceleration option of the promissory note may not be set aside by the court. Appellant has shown no justification for relieving it from the consequences of its default; on the contrary, appellant's record of chronic delinquency in repayment of the note left American with acceleration as the only reasonable course of action.

Pledger's relationship to American being known by appellant long before the foreclosure sale and no impropriety or unfairness on the part of Pledger having even been alleged, the sale should not be set aside.

Appellant, having stood by and permitted the foreclosure sale to go forward without taking steps to enjoin the sale or to indemnify the trustee or the noteholder, cannot now have the sale set aside.

Appellant's suit to set aside the foreclosure sale should, in any event, be dismissed for failure to join an indispensable party, i.e., the purchaser at the sale.

ARGUMENT

I.

Judge Richardson Having Resigned as Trustee and Appellant Having Been Notified of This Fact, Appellee Pledger as the Remaining Trustee Had the Power To Sell the Property at Foreclosure.

Appellant argues that the resignation of Randolph C. Richardson as trustee upon his appointment as a judge of the Municipal Court (now the District of Columbia Court of General Sessions) "severed" the joint tenancy thus making it unlawful for appellee Pledger, as the surviving trustee after the resignation and the death of Judge Richardson, to exercise the power of sale conferred by the deed of trust. The apparent basis for this argument is Title 45, Section 816 of the District of Columbia Code (1961 Edition), which provides in pertinent part that:

> "Every estate vested in executors or trustees, as such, shall be a joint tenancy, unless otherwise expressed."

From this statute, appellant goes on to reason that the resignation of one of the trustees causes a "severance" of the joint tenancy thus rendering impotent the remaining trustee until a substitute trustee has been appointed. Not surprisingly, appellant cites no authority in support of this proposition, nor does it give any attention to the well-known element of a joint tenancy that on the death of one joint tenant,

title passes to the survivor. 2 *Tiffany on Real Property*, Sec. 419 (3d Ed.).

Title 45, Section 614 of the District of Columbia Code (1961 Edition) expressly permits resignation of a trustee and provides that in the event of such resignation "it shall be lawful for any party interested in the execution of such trusts" to petition the court for the appointment of a substitute trustee. This language is clearly permissive and does not **require** any party to petition the court for the appointment of a trustee. Indeed, if any party interested in the execution of the deed of trust chooses to file such a petition, there is no statutory requirement that it be granted. As this court held in *Stokes v. Hinden*, 66 App. D. C. 34, 85 F. 2d 200 (1936), (referring to Title 25, Sec. 204 of the 1929 Edition of the D.C. Code, the predecessor of Sec. 45-614 of the 1961 Code),

> "* * * The wording used in these sections indicates no intention that a trustee should be substituted for each of the original trustees, where there are more than one, but only for the surviving trustee." 66 App. D. C. at 35, 85 F. 2d at 201.

Thus, appellee Pledger, as the surviving trustee, had all of the powers vested in both trustees under the terms of the deed of trust. Moreover, appellant cannot raise any question about the alleged "vacancy" created by Judge Richardson's resignation because appellant knew of this resignation at least nineteen months prior to the foreclosure herein (J.A. 37) and made no attempt to petition for the appointment of a substitute trustee in accordance with Section 45-614. One who permits another to change his position in this way is estopped later to assert a claim of invalidity. *Louis Werner Saw Mill Co. v. Helvering*, 68 App. D. C. 267, 270, 96 F. 2d 539, 542 (1938); *DeBobula v. Manhattan Storage & Transfer Co.*, 90 U. S. App. D. C. 202 203, 194 F. 2d 885, 886 (1952).

II.

Appellant Having Been Chronically Delinquent in the Repayment of the Note and the Noteholder Having Been Put to Great Expense and Inconvenience as a Result of Such Delinquency, It Was Not Unlawful for the Noteholder To Exercise the Acceleration Option of the Note.

The appellant argues that under the circumstances of this case "it is unconscionable for a Court of Equity to declare a default, thus allowing for the operation of an acceleration clause and foreclosure." (Br. 7). This is a misstatement of the question. Neither the United States District Court nor any other court "declared" a default. The noteholder, appellee American, exercised the acceleration option as it had a right to do under the terms of the note which was signed by the appellant as maker. Thus, the true question is whether this exercise of the acceleration option was so unconscionable that it must be set aside by the court. This question must be answered in light of the rule which is well-established in the District of Columbia and elsewhere that where competent parties have entered into agreement without misrepresentation, the court will not rewrite the contract simply because some of the provisions of the contract may operate to the disadvantage of one party. *Columbia Hospital v. United States Fidelity and Guaranty Company*, 88 U. S. App. D.C. 251, 256, 188 F.2d 654, 659 (1951). Also, it must be answered in light of the equally well-known doctrines of equity that the chancellor will not relieve one party to a contract of a default unless he comes into court with clean hands, before the rights of others have intervened, and exhibits such hardship as requires interposition of equitable remedies. *Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co.*, 264 F. 2d 435, 439 (8th Cir. 1959).

In the case at bar, the uncontroverted facts show appellant had a very poor record of repayment of the loan for approximately two and

one half years prior to the foreclosure sale and that on two occasions it was only after the noteholder had instructed the trustees to go forward with a foreclosure sale and steps had actually been taken to bring about such sale that the appellant brought its payments up to date (J.A. 10-11). Appellant had further failed to pay the taxes for several years, thus jeopardizing American's security interest in the property (J.A. 11, 25, 27). American had been forced to expend a substantial amount of time and money and over one thousand dollars in attorneys' fees because of appellant's numerous defaults and delinquencies in payment of the note (J. A. 39).

The clear purpose of acceleration clauses such as the one contained in the note here in issue is to relieve the noteholder from the burden of continually being compelled to expend time and money to bring about collection of each installment when it falls due. Such clauses are valid under the Negotiable Instruments Law in force in the District of Columbia, Title 28, Section 103, District of Columbia Code (1961 Edition) and have been invariably upheld by the courts. *Chicago Railway Equipment Company v. Merchant's National Bank*, 136 U. S. 268, 285, 34 L. ed. 349, 354 (1890); *Ingraham v. Mandler*, 56 F. 2d 994, 995 (10th Cir. 1932); *Hier v. Federal Glass Co.*, 102 A.2d 840 (Mun. App. D.C. 1954).

When appellant failed to make timely payment of the installment due on August 25, 1963, this was not an isolated incident but merely the latest episode in a long series of delinquent payments. Appellant attempts to minimize this delinquency by arguing that it was a default of only one day (Br. 7-8). The uncontroverted evidence, however, shows that this payment was sent to American on September 18, 1963, and received on September 20, almost a month after it was due. *

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* Although Judge Jones stated that he construed a payment dated August 26, 1963, as a default, the Judge recognized that the uncontroverted evidence showed that the payment has not been mailed until September 18 (J.A. 60).

Prior to that time, on September 12, 1963, American notified appellant of its exercise of the acceleration option. Under these circumstances, and moreover in view of the appellant's poor repayment record, the exercise of the acceleration option by the noteholder was more than justified. The return of American's letter of September 20, 1963, to appellant with the alarming notation that appellant had "moved, left no address" (J.A. 41) provided further evidence (if any was needed) that appellant was irresponsible and that immediate acceleration was the only reasonable course for American to pursue. Appellant has cited no cases in which any court has ruled that the exercise of an acceleration option in circumstances similar to those in the case at bar has been set aside as unconscionable by any court.

Appellant has further argued that appellees "by their previous actions induced appellant to believe that it may be a few days late in its payments without incurring the drastic action which was taken at the end of 1963." (Br.9). Appellant's position is apparently that the prior acceptance of late payments estops the noteholder from taking any steps to protect himself no matter how prolonged or aggravated may be the later delinquencies of the obligor. To begin with, it should be noted that in the cases which appellant cites in support of this proposition, the prior late payments were received "without objection." In the case at bar, American vigorously objected to the late payments, as is well documented by the affidavit of Justin Edgerton (J. A. 9-12), the numerous letters to appellant demanding that payments be brought up to date (J. A. 20-24, 26) and the affidavits of Earle Barton (J. A. 38-40). Indeed, upon two prior occasions American had instructed the trustee to go forward with a foreclosure sale and upon one such occasion the property was advertised and the date set (J. A. 11). Thus, appellant could not have been in any way lulled into a belief that payments need not be timely but, on the contrary, was on notice that American would insist upon timely payments of the note in accordance with the repayment schedule.

If this Court were to hold that a noteholder who objects to, but accepts, late payments is estopped to exercise his acceleration option if such late payments continue over a long period of time, it would force noteholders into a Hobson's choice: foreclose the first time a payment is one day late or forfeit the acceleration option. Such a requirement would not be in the interests of debtors, creditors or the public in general. A far sounder and more workable procedure is to permit a noteholder to accept late payments but to exercise his acceleration option if the debtor's poor payment record continues, as was done in the case at bar.

Similarly, appellant's argument that checks in purported payment of the installments were "accepted" after American had exercised its acceleration option is without foundation. These checks were never cashed and were promptly returned to appellant with a demand for payment of the full balance due on the note. (J.A. 48-49).

III.

The Foreclosure Sale Under the Deed of Trust Should Not Be Set Aside Merely Because the Trustee Was a Member of a Firm Acting as Attorneys for the Noteholder Where This Fact Was Known by Appellant Nineteen Months Prior to the Foreclosure Sale and Where No Improper Actions on the Part of the Trustee or Resulting Damage to Appellant Are Alleged.

Appellant argues that the relationship of attorney and client existing between Pledger and American invalidates the sale under the deed of trust (Br. 12-15). This relationship, however, was known by appellant at least a year and a half before the foreclosure sale as is shown by a letter to appellant from the firm of Pledger and Edgerton dated May 17, 1962, introduced into evidence by appellant itself (J.A. 37). This fact distinguishes the instant case from all of the cases cited by appellant (Br. 12-15), where the actions of trustees

related to the noteholder have been invalidated by this Court upon the ground that the relationship of trustees to noteholder was not disclosed to the debtor. In *Sheridan v. Perpetual Building Association*, 116 U.S. App. D. C. 205, 322 F. 2d 418 (1963), this Court held that the failure of the creditor or the trustees to advise the debtor of the connection between them cast upon the trustees the burden of proving that the decisions which they made in the course of their duties, which allegedly favored the creditor, were impartial and proper. 116 U. S. App. D. C. at 208, 322 F. 2d 421. As this court noted in *Sheridan*, such disclosure would have permitted the debtor to seek and obtain removal of the trustees and would have enabled the debtor to have a part in the decision of the trustees with respect to remedies against a purchaser at an earlier foreclosure sale. *Id.* In the case at bar, appellant knew of this relationship at least as early as May, 1962, and yet took no steps to remove or substitute a trustee. Having permitted the foreclosure sale to take place without objecting to the identity of the trustee, appellant cannot now assert this as a basis for setting aside the sale.

Moreover, appellant has not alleged in its complaint, nor asserted in its brief herein, that the trustee did anything improper or detrimental to appellant in the execution of his trust. At the oral argument upon the motion for summary judgment appellant's counsel was asked about this and the following colloquy ensued:

> "THE COURT: What do you claim the fiduciary, the trustee in this case, did that was wrong?
>
> "MR. BERLIN: He did the following: He went to foreclosure when there was no default. We claim, and our affidavits show, that on August 25th when the payment was due we mailed the August payment."

This is the only action taken by the trustee in this case which appellant has asserted to be improper and it is clear from the terms of the deed of trust that the trustee, when required by the noteholder,

was under an absolute duty to sell the property at foreclosure upon any default in the payment of the note (J. A. 16-17). His sale of the property at foreclosure, therefore, represented the discharge of a mandatory duty rather than a discretionary act. By contrast, the trustees in *Sheridan* were faced with a situation involving the exercise of their discretion: The remedy to be chosen upon the default of the purchaser at the first foreclosure sale. The trustees in *Sheridan* elected to forfeit the deposit of this purchaser rather than compelling him specifically to perform the contract or seeking damages. The Court of Appeals held that this decision proved to be "disastrous" for the debtor. 116 U. S. App. D. C. 211, 322 F. 2d at 424.

Thus, there is no allegation that any act of the trustee was improper and the uncontroverted evidence shows that the sale was entirely regular in all respects. Thus, *Sheridan*, and the other cases cited by appellant in which some impropriety in the execution of the trust was proven, are not in point.

IV.

Appellant, Having Knowledge of the Pendency of the Foreclosure Sale and Having Attended the Sale, and Having Taken No Steps To Enjoin the Sale or To Post a Bond or Other Security To Indemnify the Trustee, Cannot Now Be Heard To Complain of the Sale or To Have It Set Aside.

The appellant knew of the pendency of the foreclosure sale and was represented at the sale by its attorney. Nevertheless, appellant, with full knowledge of all the relevant factors including the relationship between the trustee and the noteholder, took no steps to enjoin the sale or to post a bond or otherwise indemnify the trustee. Hence, the trustee was obligated under the terms of the deed of trust to go forward with the foreclosure sale and the appellant cannot now have the sale set aside or recover damages from the trustee or the noteholder.

This Court, in *Anderson v. White*, 2 App. D. C. 408 (1894) indicated that a debtor who takes no action to enjoin a foreclosure sale is estopped later to impeach such a sale. The Court there stated:

> "Parties who, with knowledge of sufficient facts in time before sale to apply to the courts to prevent it, will not, as contended by appellees, be estopped to impeach the sale after it is made **(unless, indeed, they may have stood by and permitted an innocent purchaser to pay out his money in the belief of its validity)**; but they will be required to allege and prove substantial violations of the trust or other plain misconduct of the trustee."
> 2 App. D. C. 418 (Emphasis added).

This dictum was the basis for this Court's holding in *General Auto Truck Company v. Rust*, 66 App. D. C. 392, 88 F. 2d 774 (1936). In that case, the trustees who were stockholders and directors of the corporation representing the noteholders, sold the property to "holding trustees for the noteholders" who in turn conveyed the property to the United States Government at a higher price than was realized on the foreclosure sale. The debtor sought to recover the difference between its indebtedness and the amount realized on the sale to the Government and alleged, among other things, that fraud might be implied from the relationship of the trustees and the corporation representing the noteholder. The debtor's bill in equity was dismissed by the trial court and this dismissal affirmed by the Court of Appeals upon the ground that:

> " * * * At the time of and before the sale, plaintiff company was fully advised of all that might occur as the result of the sale, and took no steps either to prevent the sale or set it aside for the reasons now alleged to imply fraud." 66 App. D. C. at 394, 88 F.2d at 776.

This holding was reaffirmed by this Court in *Canelacos v. Holloway*, 75 U. S. App. D. C. 58, 123 F. 2d 934 (1941), where the Court refused "to set aside, because of a trustee's interest in the

debt which has been disclosed to the debtor, a fair sale to an innocent purchaser for value." 75 U. S. App. D. C. at 59, 123 F. 2d at 935.

V.

Appellant's Suit Should Be Dismissed Upon the Ground That the Purchaser of the Property at the Foreclosure Sale, an Indispensable Party, Has Not Been Made a Defendant Herein.

Appellant in this action seeks to set aside a sale of real property and yet it has failed to join the purchaser of the property, Nathan Habib, as a party defendant. The relief sought by appellant in this suit would deprive Habib of his right to the property in question and he is thus an indispensable party within the meaning of Rules 12 (b) (7) and 19 of the Federal Rules of Civil Procedure. *Shields v. Barrow*, 17 How. (U. S.) 129, 15 L. ed. 158 (1855); *Green v. Brophy*, 71 U. S. App. D. C. 299, 110 F. 2d 539 (1940).

Appellant's only justification for failure to join Habib as a party defendant is an alleged lack of jurisdiction over him. (J.A. 54-55). This contention is not well-founded, however, because jurisdiction over Habib may be invoked under Title 13, Section 336 (formerly Title 13, Section 108) of the District of Columbia Code (1961 Edition). Thus, even assuming *arguendo* that the District Court erred in granting summary judgment in favor of appellees, this case should be remanded with directions to dismiss for failure to join an indispensable party.

CONCLUSION

Appellant has not shown that it has in its favor such overwhelming equities that the acceleration provision of the note should be abrogated by this Court. Rather, the equities - as well as the provisions of the note and deed of trust - are clearly on the side of American which endured numerous delinquencies and defaults during a period of

more than two years before exercising its legal right of acceleration against a patently irresponsible debtor. Appellant's attempts to avoid the consequences of its failure to abide by the note and deed of trust are based upon the resignation and later death of Judge Richardson and upon appellee Pledger's membership in the law firm representing American. These facts were, however, known to appellant more than nineteen months prior to the foreclosure sale and no complaint was made concerning the trustee until after the sale had taken place. Moreover, appellant does not even now allege any impropriety or unfairness in the trustee's discharge of his mandatory duty to sell the property upon default. Upon the uncontroverted facts the District Court was clearly correct in granting summary judgment and appellees respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

ARGUMENT

I. In a Joint Tenancy the Resignation of One of the Two Trustees Makes the Exercise of the Power of Sale Invalid.

It is not disputed that the rights of the appellee Pledger rest on the Deed of Trust signed by officers of Appellant dated November 25, 1958. (JA 15). Nor is it disputed that these rights were given in a Joint Tenancy to Pledger and the late Judge Richardson. Furthermore, it is uncontroverted that Judge Richardson resigned as Trustee.

It follows from the foregoing undisputed facts that when a joint tenancy exists and one of the two joint tenants resigns, the joint tenancy ceases to exist. This is fundamental real estate law so well established and accepted that no cases to interpret this axiom could be found, although all legal authorities set it forth. *Thompson on Real Property,* vol. 4, Section 1776, p. 312, 2 *Tiffany on Real Property,* Section 419 (3d Ed.), 48 *C.J.S.* 936. Therefore, it follows that the remaining trustee could not validly exercise any of the powers given to him jointly with Judge Richardson. The fact that the provisions of Section 614 of Title 45 of the District of Columbia Code (1961 Edition) are not mandatory cannot be construed to mean that the remaining trustee gets the power to act. Notwithstanding the fact Sec. 45-614 grants any party the right to substitute a trustee, the statute should not be read to place the expense of substitution on the maker of the note, when the trust is for the protection and benefit of the noteholder and obviously the maker has no interest in giving the Trustees the power to act against him. The almost exclusive use of Deeds of Trust in this jurisdiction, as well as the great powers given to Trustees, must be narrowly and strictly construed to avoid abuse and results which are contrary to public policy.

II. The Acceleration Clause of the Installment Note Does Not Become Operative on a Default of One Day.

The transcript of the Trial Court below (JA 52, 61) unequivocally discloses that the basis for the Trial Court ruling was his position that a one day delay is sufficient to sustain use of the Acceleration Clause. If this Court sustains the Trial Court, this will become a precedent with unforeseen and undesirable results for all land owners who need borrow money. Appellant believes such a result to be most undesirable and unfortunate.

Appellee argues that the acceleration clause is not unconscionable in view of the fact that this is what the parties agreed upon. But this begs the question. The very reason that the doctrine of unconscionability

was developed was to prevent the overbearing effect of insistence by one party on the strict literal reading of the agreement. As was pointed out in the appellant's main brief (pp. 7-8), the allowance by this Court of use of acceleration clauses would produce "as much as one half of the encumbered landowners in this jurisdiction being suddenly confronted with paying off their installment indebtedness all at once or suffer foreclosure."

Contrary to the interpretation of appellee, appellant does not argue that American's actions forever estop it from instituting action because of late payment. An estoppel situation could have been cured if American had informed Har-Rich that, although it was accepting this payment late, it would not do so in the future. However, there is no evidence in the record that such a statement was made. On the contrary, appellee continued to accept late payments. The fact that they "objected" would mean nothing since such objection seems to have occurred before the payment was actually made. The fact remains that the record indicates that late payments were always accepted. At any rate, the question of estoppel is essentially one of fact for the jury. The granting of Summary Judgment amounted to a denial of that right to trial by jury.

Appellee says nothing of appellant's argument that it is almost universally recognized that tender of late payment amounts to a cure as far as the acceleration is concerned so long as it is made before notice of acceleration is given. The facts indicate that the check was written on August 26 and mailed "either that day or shortly thereafter." If this be believed, and the credibility of a witness should not be doubted on motion for Summary Judgment, it would indicate that payment was "tendered" by appellant before September 12, the day on which American gave notice of acceleration. Thus the fault that the letter tendering payment was postmarked and received after September 12 would seem to lie with the Post Office and not with the appellant. At any rate the question of when the letter was actually mailed is one of fact for the jury.

III. The Pleadings of Both Sides Together With Supporting Affidavits and Exhibits Clearly Shows That Genuine Issues of Fact Exist for Trial Determination.

This contention was not specifically attacked by appellee in his brief. Certainly the law with regard to Summary Judgment is fairly settled. As has been indicated, a number of issues as to material fact seem to remain after the affidavits of both sides are considered. Thus the jury should decide whether the conduct of American in habitually accepting late payments after it had "objected" amounted to an estoppel. Since reasonable men could find that the tender of payment for August was made before September 12, and since such a tender would defeat an attempt at acceleration that issue should also go to the jury.

In addition, even if these questions of fact were determined against the appellant, a jury might still find that appellee waived any rights it had to the full amount of the indebtedness by instructing Turshen to forward payments due to them on November 15 and holding them for three weeks before returning them. This question is not treated by appellee in his brief. It is a question of fact for the jury.

IV. A Fiduciary With Conflicting Interest Has the Burden of Proving That He Has Been Faithful to His Trust.

The two *Sheridan v. Perpetual Building Association* cases, 112 U.S. App. D.C. 82, 299 F.2d 463 (1962), 116 U.S. App. D.C. 205, 322 F.2d 418 (1963), have clearly set forth the eminently sound principle that the fiduciary with conflicting interests has the burden of proving that he has been faithful to his Trust.

Appellee does not question this principle nor the *Sheridan* cases and the other cases which preceded. He attempts to distinguish it on the ground that appellant became aware of the relationship and had the right to substitute a Trustee or at least attempt to do so. The facts are

that at the time of the execution of the Deed of Trust the attorney-client relationship between American, the party secured, and Pledger, the Trustee, was not known to appellant. (See JA 47). Surely it is not in dispute that a trustee is supposed to act in a manner fair to all parties. As such a Trustee should have no substantial connection with either party. In violation of this, and without informing appellant, the trustees appointed were in close attorney-client relationship. What appellee is suggesting is that appellant, having learned of this relationship much later, be forced to bear the expense of retaining counsel and instituting legal proceedings or suffer the loss of the safeguards recognized by the *Sheridan* cases.

Further, contrary to appellee's assertions in brief, appellant did contend that there was improper execution of the trust relationship (JA 2, 3).

V. The Fact That Appellant Did Not Post Bond or Indemnify Trustees Has No Legal Effect.

Appellee in making this argument cites cases involving innocent third parties. No such parties are involved here since the suit involves only American and Har-Rich and the purchaser (who has not received a conveyance) took with notice of appellant's protest and of the institution of legal action.

VI. The Suit Should Not Be Dismissed for Failure to Join An Indispensable Party.

The issue of dismissal for failure to join an indispensable party is not before this Court. (JA 61). Appellant's argument is not, as appellee claims, that the suit should not be dismissed for failure to join an indispensable party because it is unable to obtain jurisdiction over Nathan Habib. On the contrary, appellant has expressed his willingness to join Nathan Habib if that is deemed necessary. (JA 54-55). What appellant argues is that Nathan Habib is not an indispensable

party because his rights are not determined in this suit. Should it be determined that the trustee's sale was improper, then Mr. Habib will have an action against the defendants to obtain his deposit back.

CONCLUSION

For the reasons stated herein and in the appellant's main brief and of the matters of record, the Court should reverse the judgment below and remand the cause for trial on the merits.

Respectfully submitted,

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Attorney for Appellant

PETITION FOR REHEARING
PETITION FOR HEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,678

HAR-RICH REALTY CORPORATION,
Appellant,

v.

AMERICAN CONSUMER INDUSTRIES, INC., et al.,
Appellees.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,678

HAR-RICH REALTY CORPORATION,

Appellant,

v.

AMERICAN CONSUMER INDUSTRIES, INC., et al.,

Appellees.

PETITION FOR REHEARING

Appellant petitions the Court, under Rule 26 of the Rules of this Court, to grant a rehearing in this cause upon the following grounds:

1. The motion for summary judgment should not have been granted in view of the existence of genuine issues of material fact.

2. The trustee, Charles E. Pledger, Jr., was without power to authorize the foreclosure sale.

3. The effect of this opinion is to undermine the whole series of opinions of this Court which culminated in *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82 (1962); *(reh.)* 116 U.S. App. D.C. 205 (1963).

I.

In *Poller v. Columbia Broadcasting,* 368 U.S. 464 (1961) the Supreme Court of the United States restated the law of summary judgment when in the course of its opinion it stated:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case . . . show that (except as to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . It is only when the witnesses are present and subject to cross-examination that their credibility, and the weight to be given to their testimony, can be appraised. Trial by affidavits is no substitute for trial by jury which so long has been the hallmark of even handed justice. *Id.* pp. 467, 473.

The rule of law cited in the *Poller* case, *supra,* is so well established that it was felt that mere reference thereto would be sufficient in both the written brief of appellant and in the oral argument. However, the Court in its opinion did not cover this point. Accordingly the following specific issues of fact based on the record are brought to the Court's attention; they are specifically tied to statements in the Court's opinion.

1. Page 5 of the Court's opinion: "There is no allegation of misconduct in any respect whatever . . ." In response thereto appellant refers the Court to paragraphs 5, 6 and 7 of the Complaint (JA 2), the transcript of the hearing below (JA 52) and the affidavit (JA 34) Exhibits (JA 34) and letters (JA 35 and 36) where it is clearly established that at the time of the foreclosure there was no default since appellee knew that the current payment had been received and held by his office for some

time before returning same two days before the foreclosure. The record also discloses that the surviving trustee acting through his law firm which was counsel for the American Consumer Industries, the corporate appellee herein, advised and directed appellant's agent to make further payments on the note to his office (JA 34; see also page 7 of Judge Fahy's separate opinion). Such action by a trustee in seeking payment and yet going forward with foreclosure is obvious misconduct.

2. The majority opinion stated on page 3, "So, the District Judge could have seen, it was not a default of one day that was involved. . ." It went on to state on page 4 of its opinion, "If the District Judge concluded. . ." The foregoing speculations as to what the Trial Judge could have had in mind are contrary to what the Trial Judge did state (see JA 61).

For this Court to speculate on the Trial Judge's position in light of his clear statements to the contrary warrants a rehearing.

3. When a party is consistently late in making payments and those payments are nevertheless accepted, that party might reasonably be led to believe, in the absence of warning to the contrary, that he can continue to make those payments after the due date. At the very least the matter is one for the jury to determine. Moreover the question of reasonable reliance with an accompanying estoppel or waiver is greatly strengthened when the noteholder not only attempts to declare the last installment in default but also seeks to accelarete the entire indebtedness. As Judge Fahy stated in his [separate] opinion on page 6 and 7,

> "Not only had the amount due on the purchase price been reduced some $13,000 by appellant but appellee corporation had continuously accepted late payments. In the circumstances this created a waiver of its right to accelerate without at least explicitly giving prior notice of its intention to do so should default again occur. . . In any event, the issue of waiver

> and whether appellant was lulled into believing no acceleration would result from subsequent late payments were issues which should not have been disposed of by summary judgment."

The Court does not mention this reasoning in its majority opinion. The question of estoppel and/or waiver is essentially based on the facts and must be decided by the jury.

4. As we have indicated above, the statement of facts and affidavits filed indicate that appellant, by virtue of a telephone call which it had with appellee's attorneys, mailed cashier's checks constituting all installments then due (except those accelerated) to appellee's attorneys. Over one month transpired. Finally these checks were returned and foreclosure occurred two days later. Appellant argued in his brief that appellee's action in requesting, receiving, and holding these checks (after it had returned prior tender of payment) constituted acceptance of them and a waiver of the acceleration clause. It is submitted that this constitutes a matter of fact for the jury which cannot be disposed of on motion for summary judgment.

The crux of this Court's decision appears to be its statement on page 4 of its opinion.

> "If the District Judge concluded that whatever inequity the appellant had asserted had been the result of its own default and its earlier failure to assert such claims as it might have until after the auction, we will not say he erred."

It is respectfully submitted that this holding is inconsistent with that of the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Justice White, speaking for the Court, stated at page 696 with respect to summary judgment,

> "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

A weighing of equities cannot best be made on legally phrased affidavits. A judicial examination into causes should be made only when the litigants have formally presented all of their evidence in Court. This Court's decision has deprived appellant of his 'day in court'. In addition the denial of appellant's claim for damages amounts to a denial of its right to trial by jury.

II.

Appellant argued in brief (pp. 5-7) that, in the absence of the death of one of the trustees, action by both trustees is necessary to exercise the power of sale. The death-exception is based on the specific statutory provision in Title 45, Section 604 [D.C. Code]. No such express statutory exception is made for the situation where one of the trustees resigns. Since Judge Richardson resigned as trustee before his death, the question is one of a resigned trustee. (When a trustee resigns, he resigns for all purposes including the death-exception.) If, as is contended, the remaining trustee does not have the power, acting alone, to proceed with the foreclosure, then the mere fact that appellant has not instituted costly proceedings to substitute for the resigned trustee should not increase the powers of the remaining trustee. Thus if appellees wished to foreclose they should have undertaken the substitution of the trustee themselves.

III.

This Court has, through a line of cases culminating in *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82 (1962), *(on reh.)* 116 U.S. App. D.C. 205 (1963), developed guidelines for the relationship between noteholder and trustees. In the first *Sheridan* case, this Court, sitting en banc, stated:

> ". . . We have on several occasions pointed out that trustees under such deeds of trust should act for the benefit of both parties, borrower as well as lender. Trustees should be impartial and above suspicion. The practice (quite prevalent in the District of Columbia) of having directors, officers or employees of building and loan associations and other lending institutions act as trustees in foreclosure proceedings is subject to suspicion and criticism, as various cases, including this one, demonstrate." *Id.* at p. 83.

The opinion in the *Har Rich* case appears to indicate the Court's recognition of attorneys for the lender in the same category. Appellant was not aware of the relationship between the lender and the trustees at the time it signed the note (see J.A. 47), and it was not then informed of it by the lender or the trustees or anyone else.

On rehearing of the *Sheridan* case this Court stated:

> ". . . In presuming to act as trustees without disclosing to Sheridan their close association with Perpetual, Scrivener and Crowell violated, in the very beginning, their fiduciary duty to the borrower." *Id.* at p. 208.

It would be inequitable to require a borrower, upon subsequent discovery of this breach of fiduciary duty, to incur the expense of substituting trustees. Thus the borrower should be able to continue with the present trustees and nevertheless expect them to act in an independent, impartial manner. If they do not do so, he should not be subject to the argument in court that he had the right to substitute trustees and must take the consequences if he does not do so. The Court in the rehearing of the *Sheridan* case agreed with this analysis.

> "Moreover, had the trustees made full and frank disclosure of their conflicting interests, they would still have owed to both parties for whom they acted the fiduciary duty of equal consideration. *Id.* at pp. 208-209.

The pleadings and affidavits indicate that the trustee did not act impartially. He allowed the property to go to foreclosure in spite of the tender of installments due up to the time of foreclosure. Furthermore it is impossible to envisage a trustee who could be impartial in such a circumstance. The attorney whose name was signed to the letters asking for payment of the note and later notifying of foreclosure was Justin L. Edgerton of Pledger & Edgerton. While Pledger & Edgerton through Mr. Edgerton were acting on behalf of the noteholder, American Ice Co., Mr. Pledger, also a member of the firm, was supposed to be acting impartially on behalf of both parties. It is submitted that the trustee's actions in going to foreclosure under these circumstances was violative of the letter and spirit of the *Sheridan* cases and what is the law in the District of Columbia.

PETITION FOR HEARING IN BANC

Appellant petitions the Court, under 28 U.S.C. 46(c) and Rule 26 of the Rules of this Court, to grant a hearing in banc in this cause on the following grounds:

1. By affirming the motion for summary judgment, the Court of Appeals overlooked genuine issues of material fact which present substantial questions of real property law with a far reaching impact thereon transcending this case.

2. The opinion of the Court of Appeals places an improper interpretation on a number of provisions of the District of Columbia Code. Such an interpretation increases without legislative sanction the powers vested in a trustee under a Deed of Trust.

3. If the decision in the instant case is allowed to stand, the impact of this Court's decision in *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82 (1962), heard in banc, will be greatly altered.

I.

Genuine issues of material fact exist which necessitate the reversal of the order granting summary judgment. The two basic factual issues which the Court should not have affirmed are:

1. Appellant contends that appellee's actions in habitually accepting late payments induced appellant to believe that it could continue to make its payments after the due date without exposing itself to the drastic action taken by appellee. Thus, although the contract provided for acceleration in the event of default, appellee is either estopped from insisting on its rights under this provision of the Deed of Trust or is deemed to have waived its rights under this provision. It should be noted that the estoppel or waiver is only temporary and lasts only until appellee cures the consequences of its acts by notifying appellant that further defaults will incur the operation of the acceleration clause. This analysis is also advanced by Judge Fahy in the dissenting portion of his opinion.

> My reason is that by the operation of equity the course of conduct of the parties had brought about a modification of their strict legal rights and obligations as set forth originally in the deed of trust. Not only had the amount due on the purchase price been reduced some $13,000 by appellant but appellee corporation had continuously accepted late payments. In the circumstances this created a waiver of its right to accelerate without at least explicitly giving prior notice of its intention to do so should default again occur. Anno., 97 ALR 2d 997, 999; see *Edwards v. Smith,* 322 S.W. 2d 770, 776 (Mo.); *Lettieri v. Mistretta,* 102 N.J. Eq. 1, 4-5, 139 Atl. 514, 516; *Parker v. Mazur,* Tex. Civ. App., 13 S.W. 2d 174, 175. And see *Fant v. Thomas,* 131 Va. 38, 45, 108 S.E. 847, 850, 19 ALR 280. In any event, the issue of waiver and

> whether appellant was lulled into believing no acceleration would result from subsequent late payments were issues which should not have been disposed of by summary judgment. (pp. 6-7 of the opinion)

2. After the appellee had declared a default, it proceeded, through its attorney, to direct the borrower to mail a cashier's check for the balance then due to said attorney. This was done. The check was held for over one month. Finally it was returned and foreclosure was held two days later (JA 34). Appellant contended in its complaint (paragraphs 5, 6 and 7 of the Complaint, JA 2) and during the hearing on Motion for Summary Judgment (JA 52) that this constituted a waiver of the acceleration clause. The Court did not mention this argument in its opinion. Whether or not there was such a waiver is essentially a question of fact for the jury. This issue alone would warrant denial of the motion for Summary Judgment.

II.

The legal estate conveyed to a trustee is a fee simple determinable (Title 45, Section 603, District of Columbia Code). Every estate granted to two or more trustees is a joint tenancy (Title 45, Section 816, District of Columbia Code). It is fundamental property law that one joint tenant, acting alone, cannot exercise any of the powers vested in the joint tenancy and certainly not the power of sale (48 C.J.S. 936). Thus when one trustee resigns, the other may exercise the power of sale acting alone only if he survives to the rights of the other trustee. But he does not.

District of Columbia law specifically provides for survivorship upon the death of one of the trustees (Title 45, Section 604, District of Columbia Code). But it does not provide for survivorship upon resignation of one of the trustees. The remedy provided by statute for the resignation of one of the trustees is substitution of a new trustee (Title

45, Section 614, District of Columbia Code). By affirming the power of survivorship in the case of death, the Congress negated it in the case of resignation.

Furthermore, in the absence of a statutory provision there is no authority for survivorship in the case of resignation. We know of no case (in this jurisdiction or any jurisdiction) holding that such a survivorship right exists. Nor have we been cited such a case. Survivorship upon resignation is inconsistent with the concept of joint tenancy.

The Court in the instant case expresses no view on this argument. It states only that appellant could have appointed a successor but did not do so, and therefore its "inaction tells against it."

It is respectfully submitted that implicit in this position is a misinterpretation of the statute. The statute and Deed of Trust provide the trustee with certain powers. But neither statute nor Deed of Trust confers on a trustee, acting alone, the power to sell the property at a foreclosure sale. The fact that a new trustee is not appointed by either party does not increase the powers of the remaining trustee. Thus if either borrower or lender wishes action to be taken under the Deed of trust he must do so — not by waiting for some undetermined time until the other party's inaction "tells against it," but by using Title 45, Section 614, District of Columbia Code to substitute for the resigned trustee.

If, as this case appears to hold, anyone can save the expense of substituting for a resigned trustee by waiting for the indefinite time to pass, the validity of foreclosure action, releases, and any other action which trustees may take will tend to depend not simply upon the usual norms for trustee action, but also upon this indefinite waiting period. In an economic system so dependent on title insurance for the normal passage of property such additional factors, not susceptible to proof by recordation, would unnecessarily complicate passage of title, lead to

increases in title insurance rates, and unnecessary doubts as to ownership of real estate.

In addition, this decision would put the burden and expense of substituting Trustees on the debtor even though he has no interest in doing so and even though the noteholder is the one who is benefitted and requires the assistance of the Trustees when he deisres to effectuate foreclosure. Such an interpretation is inequitable and must be viewed as contrary to the intent of the Congress.

III.

The question of the fiduciary duty of a trustee on a deed of trust was considered so important that this Court saw fit to sit en banc in *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82, 299 F. 2d 463 (1962). Now, two years after that decision there is danger that this Court's decision will greatly soften its impact.

It is undisputed that a close relationship existed between the noteholder and the trustee (page 5 of the Court's opinion). Equally undisputed is the fact that appellant was not aware [when he signed], nor was he informed by either the lender or the trustees, of this close relationship (JA 47). This situation constituted a breach of the fiduciary duty from the very outset.

> In presuming to act as trustee without disclosing to Sheridan their close association with Perpetual, Scrivener and Crowell violated in the very beginning, their fiduciary duty to the borrower. *Sheridan v. Perpetual Building Association,* 116 U.S. App. D.C. 205 (1963).

In virtue of this relationship the foreclosure should not be permitted until new trustees are substituted.

> We have repeatedly pointed out the impropriety of the exercise of a power of sale under a deed of trust

> by a trustee who is, or is associated with the owner of the debt secured. The conflict between such a trustee's interest and his duty to the debtor has led us to restrain such sales and substitute a disinterested trustee. Similarly, when a trustee has failed to disclose his interest to the debtor, we have held a sale to the trustee's nominee to be wrongful. *Canelacos v. Hollway,* 75 U.S. App. D.C. 58, 123 F. 2d 934 (1941).

This Court appears to take a contrary view. It states that if the trustees by their own action reduce or eliminate the right of the noteholder to exercise his security interest against the property, the burden of rectifying the right of the noteholder to proceed to foreclosure rests on the debtor and his failure to act to correct the defect against him will cause this Court to uphold the exercise of the foreclosure. The close relationship between noteholder and trustee was created by these parties without the consent of the borrower. It would be unjust to require the injured party to incur the expense of ridding himself of the fiduciary who has, from the outset, breached his trust.

This Court also holds that no relief can be granted from the acts of the trustee in the instant case because, "There is no allegation of misconduct in any respect whatever, and no basis is made to appear upon which the action should have been declared void." (page 5 of the majority opinion) On the contrary, there is a rather serious allegation of misconduct. Appellant takes the position that the actions of the trustee and the attorney for the noteholder in accepting and holding the borrower's cashier's check constituting all sums then due on the note for over one month constituted a waiver of the acceleration clause and consequently cured any default which may have existed. For the trustee with knowledge of these facts to go through with foreclosure amounted to misconduct and breach of his duty to treat both parties impartially.

But, even if there had been no allegation of misconduct, it is submitted that such allegations are not necessary. As *Sheridan v. Perpetual*

Building Association, 112 U.S. App. D.C. 82 (1962), indicated at page 84, the burden of proof on faithfulness is on the trustee on the deed of trust. It should be noted that on rehearing of the *Sheridan* case one of the most substantial factors, if not the most substantial factor, considered by the Court in remanding the case for further proceedings was the "attitude" of one of the trustees in evidencing a lack of concern for the rights of the borrower. This "attitude" was brought out at trial — something which this Court's affirmation of summary judgment denies to this appellant.

Furthermore, this Court stated in *Sheridan v. Perpetual Building Association,* 112 U.S. App. D.C. 82 (1962) at page 83:

> We have on several occasions pointed out that trustees under such deeds of trust should act for the benefit of both parties, borrower as well as lender. Trustees should be impartial and above suspicion. The practice (quite prevalent in the District of Columbia) of having directors, officers or employees of building and loan associations and other lending institutions act as trustees in foreclosure proceedings is subject to suspicion and criticism, as various cases, including this one, demonstrate.

This practice has continued. Banks have their own "trustees"; attorneys, relatives and friends of the lender are constantly used on second trusts. The only protection which the borrower has against the non-judicially supervised sale of his property, aside from a very costly suit which he is frequently financially incapable of sustaining, is an impartial trustee. But the use of these "trustees" does not afford this protection. The situation is grave when the trustees are forced upon the borrower because of the financial superiority of the lender. It is even more inequitable when the close relationship is hidden from the borrower. There are many individuals in the District of Columbia who frequently act as trustees for a wide variety of interests. Their positions allow them to maintain their impartiality when confronted with the demands

of either borrower or lender. Consequently, necessity does not demand the use of trustees with a close relationship. This Court's negative reaction to the use of such trustees in the *Sheridan* case has had the desired effect to some extent. However, if this decision is allowed to stand public policy and the common good will be injured. Accordingly the only remedy to the situation is to declare the use of trustees with a close relationship to either party as contrary to public policy [and foreclosure thereunder invalid] especially when said close relationship is not disclosed in advance.

Respectfully submitted,

KURT BERLIN

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Washington, D.C. 20005

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Rehearing and Petition For Hearing Banc were mailed this 9th day of July, 1965, postage prepaid, to Austin P. Frum, Attorney for Appellees, 1025 Connecticut Avenue, N.W., Washington, D.C.

Kurt Berlin

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition For Rehearing and Petition For Hearing Banc are presented in good faith and not for the purpose of delay.

Kurt Berlin